

Bond University

DOCTORAL THESIS

The evaluation of the current rules of professional conduct governing legal representatives in mediation in Australian and the Unites States and a range of proposed alternative 'nonadversarial' ethics systems for lawyers

Wolski, Bobette

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**AN EVALUATION OF THE CURRENT RULES OF PROFESSIONAL CONDUCT
GOVERNING LEGAL REPRESENTATIVES IN MEDIATION IN AUSTRALIA AND THE
UNITED STATES AND OF A RANGE OF PROPOSED ALTERNATIVE ‘NON-
ADVERSARIAL’ ETHICS SYSTEMS FOR LAWYERS**

Submitted in total fulfilment of the requirements of the degree of

Doctor of Philosophy by Publication

by

Bobette Wolski

Bond University

Faculty of Law

Queensland, Australia 4229

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EXPLANATORY OVERVIEW AND EXEGESIS

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DECLARATION BY CANDIDATE

This exegesis is submitted to Bond University in fulfilment of the requirements of the degree of Doctor of Philosophy by Publication. The exegesis represents my own original work towards this research degree and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledge is made.

The exegesis is approximately 60,000 words in length, exclusive of footnotes and bibliography. I have sought and obtained permission from the Higher Degree Research Committee at Bond University to submit an exegesis of this length. In all other respects, the exegesis complies with the stipulations set out for the degree of Doctor of Philosophy by Publication by Bond University, Queensland, Australia.

.....
Bobette Wolski

.....
Date

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PUBLICATIONS SUBMITTED WITH THE EXEGESIS

The following publications of the candidate are submitted with this exegesis:

1. 'Reform of the Civil Justice System 25 Years Past – (In)Adequate Responses from Law Schools and Professional Associations? (and How Best to Change the Behaviour of Lawyers' (2011) 40 *Common Law World Review* 40-93.
2. *Skills, Ethics and Values for Legal Practice* (Thomson Reuters, 2nd ed, 2009).
3. 'Beyond Mooting: Designing an Advocacy, Ethics and Values Matrix for the Law School Curriculum' (2009) 19 *Legal Education Review* 41-82.
4. 'Reform of the Civil Justice System Two Decades Past – Implications for the Legal Profession and for Law Teachers' (2009) 21 *Bond Law Review* 192-232.
5. 'Why, How and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate Law Curriculum' (2002) 52 *Journal of Legal Education* 287.
6. 'Mediator Settlement Strategies: Winning Friends and Influencing People' (2001) 12 *Australasian Dispute Resolution Journal* 248-262.
7. 'The Model Dispute Resolution Procedure for Australian Workplace Agreements: A Dispute Systems Design Perspective' (1998) 10 *Bond Law Review* 7-38.
8. *The Laws of Australia: Title 13, Dispute Resolution* (1997) Law Book Company Limited, Sydney: Subtitle 13.6 Dispute Systems Design, 3-56.
9. 'Culture, Society and Mediation in China and the West' (1996-97) 3 *Commercial Dispute Resolution Journal* 97-123.
10. 'Voluntariness and Consensuality: Defining Characteristics of Mediation?' (1997) 15 *Australian Bar Review* 213-228.

11. 'The Role and Limitations of Fisher and Ury's Model of Interest-based Negotiation in Mediation' (1994) 5 *Australasian Dispute Resolution Journal* 210-221.

RESEARCH ABSTRACT

Currently, lawyers who represent parties in mediation are governed by the legal profession's general rules of professional conduct which make no specific provision for mediation. A number of influential authors maintain that these rules are inappropriate for, and incompatible with, mediation. They claim that mediation is based on objectives and values that are fundamentally different from those of litigation. They also claim that legal representatives undertake different roles in mediation than those that they undertake in litigation and that those new roles require new professional conduct rules. These authors have called for the promulgation of rules requiring higher standards of disclosure, good faith participation, fair dealing and use of non-adversarial interest-based negotiation. These proposals are considered in this exegesis.

This exegesis challenges the proposition that the legal profession needs new rules to govern the conduct of legal representatives in mediation. It examines and evaluates current rules of professional conduct governing lawyers in Australia and the United States as they apply to a range of ethical issues that confront legal representatives in mediation. Since the rules cannot be considered in isolation from other components of the law of lawyering, the research also examines obligations imposed on lawyers by general law, agreements to mediate (in the case of private mediations) and legislative directives to mediate (in the case of mandatory mediations).

Additionally, the research examines the features, objectives and values of litigation, mediation and unassisted negotiation and the roles undertaken by lawyers in these processes with a view to ascertaining if there are any factors which indicate the need for new rules of conduct or alternatively, the desirability of maintaining existing rule systems.

The research also critiques some of the proposals for new rules. It is argued that the rationale given for these proposals is flawed and that it is neither practical nor desirable to insist on full candour, good faith participation, non-adversarial behaviour and interest-based negotiation in mediation. It is argued instead that the current rules of professional conduct for lawyers are consistent with, and appropriate for, mediation. Together with certain external constraints which may operate on lawyers, the current rules and other components of the law of lawyering provide an adequate check on unethical behaviour in mediation. The current

general rules are also more appropriate than specific rules for application in highly contextual processes such as mediation. They allow lawyers to exercise discretion in relation to matters such as candour, good faith and cooperation, while encouraging adherence to core professional values.

The exegesis concludes with an examination of some of the ethical complexities and problems that have arisen in the practice of collaborative law, a dispute resolution process in which participants explicitly agree to abide by obligations similar to those which proponents for new rules urge upon legal representatives in mediation. Collaborative law raises new ethical dilemmas without necessarily resolving the old ones and may offer some lessons in relation to ethical issues in mediation.

The exegesis integrates, and extends, the research undertaken in a number of my published works. It also makes original contributions to the fields of Alternative Dispute Resolution Ethics and legal professional regulation. There is presently a gap in our understanding of the factors which influence the ethics of legal representatives in mediation. This research will help close the gap. It may also be of assistance to law reform and regulatory agencies in Australia who are presently considering the issue of standards of conduct for participants in mediation and other dispute resolution processes.

PART 1: INTRODUCTION

1.1 Introduction and Rationale for the Research

Many lawyers are now involved in mediation, either as a mediator or as a legal representative for one of the parties to the mediation.¹ These roles raise a host of new ethical dilemmas for lawyers. A central question arises as to whether or not these dilemmas can be resolved through the application of existing rules of professional conduct for lawyers. The focus of the literature published to date concerns the ethical complexities faced by mediators.² One explanation for this focus is that the existing rules of professional conduct for lawyers seemed obviously not to fit the activities of lawyer mediators as mediators have ‘no “client” in the classic sense of the term, as contemplated under bar regulatory systems’.³

¹ Legal disputes of virtually every kind are now subject to mediation: John Lande, ‘How Will Lawyering and Mediation Practices Transform Each Other?’ (1997) 24 *Florida State University Law Review* 839, 846. In particular, the involvement of lawyers in mediation has increased with the uptake of mediation, often in a mandatory form, by most state and federal courts and tribunals in Australia. For an account of the legislative position in each Australian jurisdiction, see David Spencer and Michael Brogan, *Mediation: Law and Practice* (Cambridge University Press, 2006) 272-304 and David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co., Thomson Reuters, 2nd ed, 2009) 430-4. Similarly there has been widespread adoption of mandatory ADR through the federal and state court systems in the US: see Wayne D Brazil, ‘Court ADR 25 Years After Pound: Have We Found a Better Way?’ (2002-2003) 18 *Ohio State Journal on Dispute Resolution* 93, 112. As Nancy Welsh notes, mediation ‘is now an integral part of the civil litigation system, used to resolve personal injury, contract, employment, divorce, child custody, and many other civil matters’: Nancy A Welsh, ‘Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value’ (2003-2004) 19 *Ohio State Journal on Dispute Resolution* 573, 583. Generally on the involvement of lawyers as legal representatives in mediation, see Chiara-Marisa Caputo, ‘Lawyers’ Participation in Mediation’ (2007) 18 *Australasian Dispute Resolution Journal* 84.

² Relevant literature includes: Rachael Field, ‘Rethinking Mediation Ethics: A Contextual Method to Support Party Self-determination’ (2011) 22 *Australasian Dispute Resolution Journal* 8; Naomi Cukier, ‘Lawyers Acting as Mediators: Ethical Dilemmas in the Shift From Advocacy to Impartiality’ (2010) 21 *Australasian Dispute Resolution Journal* 59; Charles Pou Jr, ‘“Embracing Limbo”: Thinking About Rethinking Dispute Resolution Ethics’ (2003-2004) 108 *Pennsylvania State Law Review* 199; Robert P Burns, ‘Some Ethical Issues Surrounding Mediation’ (2001-2002) 70 *Fordham Law Review* 691; Diane K Vescovo, Allen S Blair and Hayden D Lait, ‘Essay – Ethical Dilemmas in Mediation’ (2000-2001) 31 *University of Memphis Law Review* 59; Carrie Menkel-Meadow, ‘Ethics and Professionalism in Non-Adversarial Lawyering’ (1999-2000) 27 *Florida State University Law Review* 153 (‘Non-Adversarial Lawyering’); Robert P Schuwerk, ‘Reflections on Ethics and Mediation’ (1997) 38 *South Texas Law Review* 757; Carrie Menkel-Meadow, ‘Ethics in Alternative Dispute Resolution: New Issues, No Answers From the Adversary Conception of Lawyers’ Responsibility’ (1997) 38 *South Texas Law Review* 407 (‘Ethics in Alternative Dispute Resolution’); Robert B Moberly, ‘Mediator Gag Rules: Is It Ethical For Mediators to Evaluate or Advise?’ (1997) 38 *South Texas Law Review* 669; Robert A Baruch Bush, ‘Symposium: The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications’ [1994] *Journal of Dispute Resolution* 1 (‘The Dilemmas of Mediation Practice’); Robert A Baruch Bush, ‘Efficiency and Protection, or Empowerment and Recognition?: The Mediator’s Role and Ethical Standards in Mediation’ (1989) 41 *Florida Law Review* 253 (‘Ethical Standards in Mediation’); Leonard L Riskin, ‘Toward New Standards for the Neutral Lawyer in Mediation’ (1984) 26 *Arizona Law Review* 329. On the situation in the UK, see Andrew Boon and Jennifer Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, 2nd ed, 2008) 421.

³ Phyllis E Bernard, ‘Dispute Resolution and the Unauthorized Practice of Law’ in Phyllis Bernard and Bryant Garth (eds), *Dispute Resolution Ethics: A Comprehensive Guide* (American Bar Association Section of Dispute

Separate or supplementary ethical standards and guidelines have been developed for lawyer mediators in most jurisdictions by the professional bodies to which lawyers belong.⁴ Additionally, relevant mediator standards have been developed by a number of other ADR practitioner accreditation organisations whose membership is not restricted to lawyers.⁵ In contrast, comparatively little attention is given in the literature to the ethical position of legal representatives in mediation⁶ and policy makers, law reform agencies and relevant professional bodies have been slow to consider the question of whether or not alternative or supplementary standards of conduct are required to govern their behaviour in mediation.⁷

Resolution, 2002) 89, 98. Much of the momentum towards the development of codes of conduct for mediators is attributable to a perceived need to professionalize the practice of mediation. Generally, on the subject of the regulation of mediators, see Rachael Field, 'A Mediation Profession in Australia: An Improved Framework for Mediation Ethics' (2007) 18 *Australasian Dispute Resolution Journal* 178.

⁴ In Australia, guidelines for mediators have been promulgated by the peak national associations for lawyers (ie the Law Council of Australia and the Australian Bar Association) and by various state and territory law societies and bar associations: see below n 491 and n 492 for further details. The position is similar in the US, see below n 493.

⁵ Most recently in Australia, standards have been promulgated in connection with the National Mediator Accreditation System (hereafter NMAS) which commenced operation on 1 January 2008. For more details on this system and other ADR practitioner accreditation organisations, see below n 493 and n 494. There are also some subject-matter based standards, details of which are discussed below n 496.

⁶ Carrie Menkel-Meadow drew attention to this gap in research almost 15 years ago: Carrie Menkel-Meadow, 'Ethics in ADR Representation: A Road Map of Critical Issues' (1997) (Winter) *Dispute Resolution Magazine* 3 ('*Ethics in ADR Representation*'). As Catherine Morris notes, discussions about mediation and ethics often focus exclusively on the mediator's role: see Catherine Morris, 'The Trusted Mediator: Ethics and Interaction in Mediation' in Julie Macfarlane (ed), *Rethinking Disputes: The Mediation Alternative* (Cavendish Publishing, 1997) 301, 301. Also see John W Cooley, 'Defining the Ethical Limits of Acceptable Deception in Mediation' (2003-2004) 4 *Pepperdine Dispute Resolution Journal* 263, 270 who makes a similar observation. There have been some contributions made to this area although as indicated by the titles, this work represents a piecemeal approach to the topic of ethics and legal representatives in mediation, for the most part, focusing on a particular context (such as construction law mediations) or a particular aspect of ethics (eg candour). The most significant contributions to this area are: Don Peters, 'When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal' [2007] *Journal of Dispute Resolution* 119; Harold Abramson, 'Problem-Solving Advocacy in Mediation: A Model of Client Representation' (2005) 10 *Harvard Negotiation Law Review* 103; James M Bowie, 'Ethical Issues in Construction Mediation: Are There Any Rules' (2004) 24 *Construction Law* 33; Patricia Hughes, 'Ethics in Mediation: Which Rules? Whose Rules?' (2001) 50 *University of New Brunswick Law Journal* 251 (the author gives brief attention to the position in Canada); Kimberlee K Kovach, 'New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation' (2000-2001) 28 *Fordham Urban Law Journal* 935 ('*New Wine Requires New Wineskins*'); James J Alfani, 'Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1' (1999) 19 *Northern Illinois University Law Review* 255; Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2 (although the focus of this work is on lawyer mediators); Jacqueline M Nolan-Haley, 'Lawyers, Clients, and Mediation' (1997-1998) 73 *Notre Dame Law Review* 1369; and Gerard Sammon, 'The Ethical Duties of Lawyers Who Act for Parties to a Mediation' (1993) 4 *Australian Dispute Resolution Journal* 190. The most recent contribution to this area is by Samantha Hardy and Olivia Rundle, *Mediation for Lawyers* (CCH Australia Limited, 2010) ch 7. Most general texts on mediation give little attention to the role of legal representatives in mediation. Schmitz examines the treatment given to the topic by three major texts, two of which are written for lawyers, and concludes that they 'understate the importance of the lawyer's role as ADR counselor and advocate, while simultaneously focusing too much on the lawyer's role as mediator': Suzanne J Schmitz, 'What Should We Teach in ADR Courses?: Concepts and Skills for Lawyers Representing Clients in Mediation' (2001) 6 *Harvard Negotiation Law Review* 189.

⁷ There are some exceptions. Guidelines for lawyers as legal representatives in mediation have been promulgated by the Law Council of Australia (*Guidelines for Lawyers in Mediation* (March 2007)) and the Law Society of New South Wales (*Professional Standards for Legal Representatives in a Mediation*, promulgated in

In the absence of specific standards of conduct, lawyers who represent parties in mediation are governed only by the general rules of professional conduct promulgated by the law societies and bar associations to which they belong, together with other components of the ‘law of lawyering’. However, a number of influential authors maintain that the legal profession’s general rules of conduct were fashioned with adversarial litigation in mind⁸ and that they are inappropriate for, and incompatible with, mediation⁹ - a process which, claim the critics, is based on objectives and values fundamentally different from those of litigation. Some of these authors (and occasionally, law reform agencies)¹⁰ have argued for the development of new ‘non-adversarial ethics standards’ for lawyers who represent clients in mediation and other ‘non adversarial’ contexts.¹¹ These authors have called for the introduction of rules requiring higher standards of disclosure than those owed by lawyers in a

1993 and last updated 1 January 2008). These guidelines are discussed in more detail in Part 2. However, it is only recently that a dedicated national approach has been taken on the subject of participant conduct obligations in mediation. In July 2010 the National Alternative Dispute Resolution Advisory Council (NADRAC) was requested by the Federal Attorney-General to advise on legislative reform of the Australian federal civil justice system required to protect the integrity of different ADR processes. NADRAC delivered its report on 28 February 2011: see NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes: From Principles to Practice Through People*, A Report to the Attorney-General (February 2011) (*‘Maintaining and Enhancing the Integrity of ADR Processes Report’*). NADRAC considered the question of the statutory imposition of conduct obligations on participants, their representatives, and ADR practitioners. Also see NADRAC’s earlier report, *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*, A Report to the Attorney-General (September 2009), Schedule 2 (*‘The Resolve to Resolve Report’*). Also see the Victorian Law Reform Commission (VLRC), *Civil Justice Review*, Report No 14 (March 2008) Chapter 3: ‘Improving the Standards of Conduct of Participants in Civil Litigation’ (*‘Civil Justice Review Report’*).

⁸ Robert C Bordone, ‘Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes’ (2005-2006) 21 *Ohio State Journal on Dispute Resolution* 1, 3; Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 410; and Kimberlee K Kovach, ‘Good Faith in Mediation - Requested, Recommended, or Required? A New Ethic’ (1997) 38 *South Texas Law Review* 575, 619 (*‘Good Faith in Mediation’*).

⁹ Carrie Menkel-Meadow, ‘Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve’ (2004) 57 *Current Legal Problems* 84, 106; Christopher M Fairman, ‘Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads’ (2002-2003) 18 *Ohio State Journal on Dispute Resolution* 505, 528; Kimberlee K Kovach, ‘Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards’ (2002-2003) 39 *Idaho Law Review* 399, 413-4 (*‘Plurality in Lawyering Roles’*); Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 410; Kovach, *Good Faith in Mediation*, above n 8, 620. Alfini also believes that the current rules provide little guidance: Alfini, above n 6, 266.

¹⁰ For instance, the Australian Law Reform Commission recommended the development of standards of conduct for legal representatives in negotiation and other ADR processes (with inclusion of a requirement that practitioners act in good faith): Australian Law Reform Commission (ALRC), *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [3.119] (hereafter referred to by the Commission’s reference ‘ALRC 89’).

¹¹ Kovach, *Plurality in Lawyering Roles*, above n 9, 413-4; Fairman, above n 9, 528; Kovach, *New Wine Requires New Wineskins*, above n 6, 943, 953; Jacqueline M Nolan-Haley, ‘Introduction: Lawyers’ Ethics in ADR’ (2000-2001) 28 *Fordham Urban Law Journal* 891, 893-894; Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 453-4; Kovach, *Good Faith in Mediation*, above 8, 618-9. A number of authors also call for new rules to govern lawyers conduct in negotiations see eg Ysaiah Ross, *Ethics in Law: Lawyers’ Responsibility and Accountability in Australia* (LexisNexis Butterworths, 5th ed, 2010) 523 and Jim Parke, ‘Lawyers as Negotiators: Time for a Code of Ethics?’ (1993) 4 *Australian Dispute Resolution Journal* 216.

litigation and negotiation context, good faith participation, fair dealing, cooperation and interest-based negotiation. These authors would have legal representatives in mediation governed by requirements similar to those accepted by the participants (lawyers and clients) in collaborative law.

1.2 Research Problem

This research examines and evaluates the current rules of professional conduct governing lawyers in Australia and, to a lesser extent, the United States as they apply to a number of common ethical issues that confront legal representatives in mediation.¹² The rules are considered in the context of other components of the law of lawyering and conduct obligations which might be agreed to by the parties (in the case of private mediations) or imposed upon them by legislative directive (in the case of mandatory mediations).

The research also examines the features, objectives and values of litigation, mediation and unassisted negotiation and the roles undertaken by legal representatives within these processes with a view to ascertaining if there are any factors which indicate the need for new rules of conduct or alternatively, the desirability of maintaining existing rule systems.

Additionally, the research critiques the rationale given for, and the content of, a range of proposals for new rules of conduct for legal representatives in mediation. As mentioned above, these proposals typically call for the introduction of rules requiring higher standards of disclosure, good faith participation, fair dealing, cooperation and interest-based negotiation. The research explores the feasibility and desirability of these proposed new rules (in part, using collaborative law as an analytical framework) to determine if they offer more appropriate alternatives to the regulation of the behaviour of legal representatives in mediation than that provided by current rule systems governing lawyers.

¹² As other authors have noted, there is a 'relative dearth of literature dealing with legal ethics in Australia and the UK' so it is necessary to refer to, and draw on, literature published in the US: Mirko Bagaric and Penny Dimopoulos, 'Legal Ethics is (Just) Normal Ethics: Towards a Coherent System of Legal Ethics' (2003) 3 *Queensland University of Technology Law and Justice Journal* 367, 368.

The research problem was chosen as a vehicle through which to integrate a number of my published works and to extend my research in a new direction, that of 'Dispute Resolution Ethics' or 'ADR Ethics'¹³ and legal professional regulation.

1.3 Objectives of Research and Research Questions

There are seven objectives to be achieved in this research. They are:

1. To identify and examine a number of ethical issues which arise in mediation from the perspective of legal representatives for the parties.
2. To evaluate the current rules of professional conduct governing legal representatives in Australia and the US, for their appropriateness and compatibility with mediation.
3. To identify factors, if any, which set mediation apart from litigation and unassisted negotiation and which indicate either a) the need for new rules of professional conduct for legal representatives in mediation or b) the desirability of maintaining existing rule systems, as may be the case.
4. To evaluate the rationale given for, and the content of, a range of proposed alternative ethics systems for legal representatives in mediation.
5. To identify other reasons, if any, which favour the retention of the current general rules of professional conduct for legal representatives in mediation or which indicate the need for additional or supplementary rules which are more specific in nature.
6. To ascertain what place discretion has in ethical decision-making by legal representatives in mediation and to identify some of the factors which might influence the exercise of that discretion.
7. To test the feasibility of some of the proposals for new non-adversarial rules of professional conduct through the framework of collaborative law.

The research will address the following series of questions:

1. What ethical issues commonly arise in mediation from the perspective of legal representatives for the parties to the mediation?

¹³ The terms 'Dispute Resolution Ethics' and 'ADR Ethics' are now being used to describe this new field which combines ethics, legal ethics and dispute resolution: see eg Phyllis Bernard and Bryant Garth (eds), *Dispute Resolution Ethics: A Comprehensive Guide* (American Bar Association Section of Dispute Resolution, 2002) and Scott R Peppet, 'ADR Ethics' (2004) 54 *Journal of Legal Education* 72.

2. How might these ethical issues be resolved using the current rules of professional conduct and other components of the law of lawyering in Australia and the US?
3. How is the resolution of these issues affected by conduct obligations agreed to by the participants (in the case of private mediations) or imposed by legislation (in the case of mandatory mediations)?
4. What factors impact the ethics of legal representatives in mediation (and how are these factors different from, or similar to, those which affect legal representatives in litigation and unassisted negotiation)?
5. Do these factors indicate the need for new rules of professional conduct for legal representatives in mediation? If not, why not? Alternatively, do these factors support the retention of the existing rules of conduct for lawyers and if so, why?
6. What alternative rule systems have been proposed for legal representatives in mediation? What are the problems, if any, with these proposals?
7. Are there other reasons for a) introducing new rules of professional conduct for legal representatives in mediation or b) retaining existing rule systems and if so what are they?
8. What role does discretion play in ethical decision-making and what factors are relevant to the ethical evaluation process used by legal representatives in mediation?
9. What lessons can be learned from collaborative law?

1.4 Methodology and Literature Review

This exegesis relies upon, integrates and extends the research undertaken in a number of my published works (details of which are given later in this part of the submission). The research in these works is doctrinal in nature. I have conducted extensive additional research, also of a doctrinal nature, to complete this exegesis. The research might best be categorised as ‘testing-out research’ aimed at ‘trying to find the limits of previously proposed generalizations’.¹⁴ The parent disciplines of this research are legal ethics (and more generally, ethics), negotiation, mediation and litigation. There is abundant literature in each of these fields but very little of it relates to the ethical position of legal representatives in mediation. I believe that this research makes a significant original contribution to the fields of ADR Ethics and legal professional regulation. My research will provide the foundation for further debate

¹⁴ Estelle M Phillips and Derek S Pugh, *How to Get a PhD: A Handbook for Students and Their Supervisors* (Open University Press, 4th ed, 2005) 52.

on issues of critical importance to lawyers in mediation. It may also be of use to policy makers and law reform agencies who are currently interested in the issue of participant conduct obligations in mediation and similar dispute resolution processes.

I have not included a separate literature review in this submission. Every part of the exegesis contains a review of the literature relevant to the issues under discussion. I draw upon texts and law journal articles, upon case law on legal ethics in Australia and the US, and upon a range of policy reform proposals (including recommendations from law reform commissions, and from the National Alternative Dispute Resolution Advisory Council in Australia).

I also examine and critique a number of sources of ethical obligations for lawyers including:

1. agreements to mediate;
2. legislative directives to mediate; and
3. standards and guidelines issued by professional bodies for the conduct of mediators and legal representatives in Australia (at both state and federal levels) and the United States (predominantly at the federal level).

In the next section, I define key terms and set out the scope and limitations of the exegesis.

1.5 Definitions and Scope of the Research

This research examines the rules of professional conduct and other components of the law of lawyering governing legal representatives in mediation. Some attention is also given to the ethical dimensions of negotiation, litigation and collaborative law.

I use the term ‘legal representative’ or ‘legal practitioner’ to refer to a lawyer¹⁵ who has entered into a representative relationship with a client. For the purpose of this exegesis, it is

¹⁵ A lawyer is a person who has been authorised to practise law and who holds a current practising certificate issued by an appropriate regulatory authority. In Australia, as elsewhere, statute prohibits a person who does not hold a current practising certificate from practising law. In Australia, see the relevant legal profession legislation (*Legal Profession Act 2006* (ACT) s 16; *Legal Profession Act 2004* (NSW) s 14(1); *Legal Profession Act* (NT) s 18; *Legal Profession Act 2007* (Qld) s 24(1); *Legal Practitioners Act 1981* (SA) s 21(1); *Legal Profession Act 1993* (Tas) s 53(1); *Legal Profession Act 2004* (Vic) s 2.2.2(1); and *Legal Practice Act 2003* (WA) s 35(1). For

assumed that legal representatives act for a single entity rather than for multiple parties. It is outside the scope of this research to examine ethical issues which arise when one acts for a group of persons (for example, questions about the meaning of ‘consensus’ and possible duties to provide ‘adequate voice, participation, and involvement in agreements’).¹⁶

The expression ‘the law of lawyering’¹⁷ refers to the body of law which regulates the behaviour of members of the legal profession. It consists of relevant portions of the law of contract, torts, equity, adjectival law, general legislation, legislation governing the practice of the law and the rules of professional conduct promulgated by the regulatory bodies to which lawyers belong. This research focuses on the rules of professional conduct.

The rules of professional conduct are considered to be rules of ethics. A ‘rule’ may be defined as ‘a regulation or principle governing conduct or procedure within a particular area of activity’.¹⁸ The term ‘ethics’ is ‘loosely defined as the question of what is “right” or “good” behaviour from a moral, as opposed to an aesthetic, practical, etc, point of view’.¹⁹ Ethics ‘grow out of particular philosophies, which purport to (1) define the nature of the world in which we live and (2) prescribe rules for living together’.²⁰ Specialised rule systems have evolved for lawyers, giving rise to the expression ‘legal ethics’, a term used by Nagorcka, Stanton and Wilson to refer to ‘a system of rules based on moral principles that directs the conduct of the legal profession’.²¹

a discussion of the requirements to practise the law, see Bobette Wolski, *Skills, Ethics and Values for Legal Practice* (LawBook Co., Thomson Reuters, 2nd ed, 2009) 5-7.

¹⁶ Carrie Menkel-Meadow, ‘Introduction: What’s Fair in Negotiations? What is Ethics in Negotiation?’ in Carrie Menkel-Meadow and Michael Wheeler (eds), *What’s Fair: Ethics for Negotiators* (Jossey-Bass, 2004), xvi.

¹⁷ There is some confusion over the meaning of the term ‘the law of lawyering’. Kutak uses the term to refer only to the body of regulatory law encompassed in the American Bar Association Model Rules of Professional Conduct: Robert J Kutak, ‘The Law of Lawyering’ (1982-1983) 22 *Washburn Law Journal* 413, 413. Parker and Evans use the term more broadly as I have done: Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 2007) 3.

¹⁸ Catherine Soanes and Angus Stevenson, *Concise Oxford English Dictionary* (Oxford University Press, 11th revised ed, 2006) 1257.

¹⁹ Donald Nicolson, ‘Mapping Professional Legal Ethics: The Form and Focus of the Codes’ (1998) 1 *Legal Ethics* 51. This definition tracks pretty closely with the *Concise Oxford English Dictionary* which defines ‘ethics’ as ‘the moral principles governing or influencing conduct’, where ‘moral’ is ‘concerned ... with the principles of right and wrong behaviour’: see Soanes and Stevenson, above n 18, 490 and 927. Also see Preston who notes that ‘[i]n general, ethics is concerned about what is *right, fair, just* or *good*; about what we *ought* to do, not just about what *is* the case or what is most acceptable or expedient’: Noel Preston, *Understanding Ethics* (Federation Press, 3rd ed, 2007) 16 and Parker and Evans who stress that ethics ‘is concerned with deciding what is the good or right thing to do’: above n 17, 2.

²⁰ Roy J Lewicki, Bruce Barry and David M Saunders, *Negotiation* (McGraw-Hill, 6th ed, 2010) 254.

²¹ Felicity Nagorcka, Michael Stanton and Michael Wilson, ‘Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice’ (2005) 29 *Melbourne University Law Review* 448, 451. For a similar definition, see Bagaric and Dimopoulos, above n 12,

I recognise that, in focusing on the rules of professional conduct, I focus on a rule-based or duty-based approach²² to legal ethics which is only one of a number of overarching approaches to ethical reasoning²³ which might be adopted by legal practitioners.²⁴ Other approaches include end-result ethics (a lawyer might determine the rightness of an action by evaluating the consequences of the action eg he or she might consider lying to be justified if it serves the objectives of the client in the long run);²⁵ social contract ethics (a lawyer might determine the rightness of an action by reference to the customs and social norms of the legal community and consider some lying to be standard practice in legal negotiations);²⁶ and personalistic ethics (a lawyer may decide the rightness of an action on the basis of his or her own conscious and moral standards).²⁷ While these approaches may have some influence on lawyers, there is evidence that lawyers identify strongly with a rule-based approach.²⁸ Whatever approach (or approaches) a lawyer adopts, he or she will be guided by the rules of professional conduct.

369. A more comprehensive definition of 'legal ethics' (distinguishing macro and micro legal ethics) is provided by Richard O'Dair, *Legal Ethics Text and Materials* (Cambridge University Press, 2001) 5-6. This exegesis concerns micro legal ethics. For a discussion of the concepts of ethics, morality and professionalism, see Wolski, above n 15, 52-5.

²² Also referred to as a deontological approach: Parker and Evans, above n 17, 4; Nagorcka, Stanton and Wilson, above n 21, 450; Lewicki, Barry and Saunders, above n 20, 260-2. Also see G. Richard Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* (Penguin Books, 2006) who refers to this approach as the 'Do the Right Thing Even If It Hurts' school: 212.

²³ See Lewicki, Barry and Saunders, above n 20, 256-64 for a discussion of four different approaches to ethical reasoning.

²⁴ Wade refers to this as the 'What Does the Code of Ethics Say?' Approach: John Wade, 'Persuasion in Negotiation and Mediation' (2008) 8 *Queensland University of Technology Law and Justice Journal* 253, 277, footnote 26. Also see Fletcher who notes that when using this approach, 'the moral agent asks, "What does the rule prescribe?"': Joseph Fletcher, 'Situation Ethics, Law and Watergate' (1975-1976) 6 *Cumberland Law Review* 35, 37.

²⁵ This is also referred to as a teleological or consequentialist approach: see Nagorcka, Stanton and Wilson, above n 21, 450. The best known theory in this category is utilitarianism which suggests that the action that maximises the public good or the greatest amount of favourable consequences should prevail: Parker and Evans, above n 17, 5 and Gino Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co., 3rd ed, 2006) 3.

²⁶ Lewicki, Barry and Saunders, above n 20, 262-3.

²⁷ Ibid 263-4.

²⁸ According to Kovach, '[l]awyers have demonstrated a need and custom of governance by a set of rules or standards': Kovach, *Good Faith in Mediation*, above n 8, 620. Also see Kimberlee K Kovach, 'Ethics for Whom? The Recognition of Diversity in Lawyering Calls for Plurality in Ethical Considerations and Rules of Representational Work' in Bernard and Garth, above n 3, 57, 62 ('*Ethics for Whom?*'). Also see Peppet who argues that '[t]he codes are of paramount importance in structuring attorneys' behaviour': Scott Peppet, 'Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism' (2004-2005) 90 *Iowa Law Review* 475, 506. Note however the different observations made by Wade who identifies a fifth ethics tradition of 'pragmatism' (or 'don't do this as you will get into trouble') which he concludes appears to be the dominant conversation among lawyers: Wade, above n 24, 277, footnote 26. A similar approach is identified by Shell as the 'What Goes Around Comes Around' Pragmatist School: G Richard Shell, 'Bargaining with the Devil Without Losing Your Soul: Ethics in Negotiation' in Menkel-Meadow and Michael Wheeler, above n 16, 57, 68; and Shell, above n 22, 213.

In focusing on the rules, I do not mean to suggest that ethics should be conflated with the rules of conduct promulgated by lawyers' professional bodies. It is widely agreed that these rules set only minimum standards or base levels of conduct rather than ceilings.²⁹ Lawyers should strive to exceed these minimum standards of conduct. One of the aims of this research is to attempt to identify the minimum standards which apply in mediation. The research also explores some of the 'grey areas' which inevitably arise in the process of interpreting and applying the rules.³⁰ It is in these grey areas that lawyers are most likely to be confronted with ethical dilemmas.

An ethical dilemma arises when there is a '[c]hoice of competing values (ideas of goodness)'³¹ which suggests 'a variety of alternative and contradictory courses of action'.³² Fundamentally, ethics is all about values as Preston notes by observing that 'in a preliminary way we may regard ethics as *the study which arises from the human capacity to choose among values*'.³³

Whether or not they are conscious of doing so, lawyers engage in an ethical evaluation process when confronted with ethical dilemmas. An ethical evaluation process has been described as 'a process for working out in concrete and particular circumstances what is the ethically fitting course to be followed'.³⁴ It 'involves a balance of conflicting values and a search for the best solution to a specific set of circumstances'.³⁵ This research identifies some of the factors which legal representatives might take into account in deciding which is the 'ethically fitting' course to be followed when confronted with alternative and contradictory courses of action.

²⁹ Dal Pont, above n 25, 4; Carol Rice Andrews, 'Highway 101: Lessons In Legal Ethics That We Can Learn On the Road' (2001-2002) 15 *Georgetown Journal of Legal Ethics* 95; Boon and Levin, above n 2, 7; Thomas W Giegerich, 'The Lawyer's Moral Paradox' (1979) 6 *Duke Law Journal* 1335, 1336.

³⁰ Parker and Evans, above n 17, 4; Ross, above n 11, 10-11; Dal Pont above n 25, 19; Boon and Levin, above n 2, 7 (and references cited therein).

³¹ Fletcher, above n 24, 55. Also see Julie MacFarlane, 'Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model' (2002) 40 *Osgoode Hall Law Journal* 49, 57 and Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8 *Pepperdine Dispute Resolution Law Journal* 243, 255 for similar descriptions of an ethical dilemma.

³² Parker and Evans, above n 17, 10. Also see MacFarlane, above n 31, 57. For discussion about the nature of ethical dilemmas in mediation, see Pou, above n 2, 216; Bush, *The Dilemmas of Mediation Practice*, above n 2, 3.

³³ Preston, above n 19, 7. Also see Nagorcka, Stanton and Wilson, above n 21, 475.

³⁴ Preston, above n 19, 65.

³⁵ Shapira, above n 31, 255. Also see Parker and Evans who assert that ethics 'asks us to examine the competing interests and principles at stake in each situation and have reasons as to why one should triumph over the other, or how they can be reconciled': Parker and Evans, above n 17, 2.

Inevitably, different practitioners may choose different courses of action when confronted with the same or similar ethical dilemmas. According to the relevant literature, that does not matter.³⁶ No model of ethical decision-making will

guarantee the same response by different people in similar circumstances, but it should represent a guarantee that a comprehensive and responsive approach will be undertaken before deciding, and that consequently, a framework for consultation and collaborative dialogue about ethical matters is more possible.³⁷

Although legal practitioners may arrive at different conclusions, each practitioner should have good reasons for what they do and the action they take. They should be able to justify the consequences of their actions.

This research is concerned with ethical dilemmas in mediation, and by implication, with those which arise in negotiation and litigation.

The term ‘negotiation’ is defined as a process in which the parties confer with each other for the purpose of reaching an agreement.³⁸ It generally takes one of two main forms, namely unassisted or assisted negotiation. Unassisted negotiation takes place when the parties (who may be legally represented) negotiate without the assistance of an independent third person. Assisted negotiation takes place when the parties negotiate with the assistance of a third person, who may be a non-professional such as a family member or friend, or a professional dispute resolver such as a mediator.

³⁶ Preston, above n 19, 77.

³⁷ Ibid. Also see James E Elkins, ‘Lawyer Ethics: A Pedagogical Mosaic’ (2000) 14 *Notre Dame Journal of Law, Ethics and Public Policy* 117, 213; and Parker and Evans, above n 17, who emphasise the reasoning process involved in ethical decision making.

³⁸ For further definitions of negotiation, see Nadja Alexander and Jill Howieson, *Negotiation: Strategy, Style, Skills* (LexisNexis Butterworths, 2nd ed, 2010) 3; Lewicki, Barry and Saunders, above n 20, 6.

There is no single definition of ‘mediation’ that would meet with universal acceptance.³⁹ ‘The lack of definitional certainty reflects the fact that there is great diversity in mediation practice.’⁴⁰ For the purpose of this exegesis, mediation is defined in broad terms as a process in which an acceptable third party, the mediator, undertakes a range of activities to assist the parties involved in a dispute or a potential deal to negotiate an agreement.⁴¹ The activities undertaken by the mediator fall short of imposing a decision upon the parties. This definition accords with modern definitions of mediation. As Weckstein notes ‘most modern definitions of mediation contain two common elements: (1) third-party facilitation of dispute settlement, and (2) lack of third-party power to determine the resolution of the dispute.’⁴²

As suggested above, mediation may be used for a range of purposes (eg to resolve disputes or to settle the terms of contracts and other transactions).⁴³ This research is limited to mediation in dispute resolution although its analysis often will apply equally well to both dispute resolution and deal making.

Mediation may take place pursuant to an agreement between the parties (an arrangement referred to here as ‘private mediation’) or pursuant to court or tribunal order or other legislative provision⁴⁴ (referred to here as ‘mandatory mediation’).⁴⁵ It may be necessary to

³⁹ For a range of definitions, see Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Giving In* (Jossey-Bass Publishers, 1988) 7; Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, 3rd ed, 2003) 15; Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 13, 26; NADRAC, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (September 2003) available at <http://www.nadrac.gov.au> viewed 25 May 2011; Bush, *Ethical Standards in Mediation*, above n 2, 254. More recent definitions are shorter and broader – allowing many more forms of practice to fall within its parameters.

⁴⁰ Wolski, above n 15, 585. Also see Burns, above n 2, 701; Spencer and Hardy, above n 1, 152; John Wade, ‘Current Trends and Models in Dispute Resolution: Part 1’ (1998) 9 *Australian Dispute Resolution Journal* 59, 62-64.

⁴¹ Bobette Wolski, ‘Culture, Society and Mediation in China and the West’ (1996-97) 3 *Commercial Dispute Resolution Journal* 97, 98-9. Also see Wolski, above n 15, 585.

⁴² Donald T Weckstein, ‘In Praise of Party Empowerment – and of Mediator Activism’ (1997) 33 *Willamette Law Review* 501, 508 (citations omitted). Early writings on mediation emphasised ‘voluntarism’ and ‘consensuality’ as essential components of mediation but offered little guidance as to the meaning of these terms within the context of mediation: Richard Ingleby, ‘Compulsion Is Not The Answer’ (1992) 27 *Australian Law News* 17, 18; Peter S Adler, ‘Resolving Public Policy Conflicts Through Mediation: The Water Code Roundtable’ (1990) 1 *Australian Dispute Resolution Journal* 69, 78; and Hilary Astor and Christine M Chinkin, *Dispute Resolution in Australia* (Butterworths, 1992) 180. In an earlier work, I concluded that the defining characteristic of mediation in terms of ‘voluntariness’ and ‘consensuality’ is the parties’ ability to accept or reject particular outcomes and to refuse to settle: Bobette Wolski, ‘Voluntariness and Consensuality: Defining Characteristics of Mediation?’ (1997) 15 *Australian Bar Review* 213, 226-8.

⁴³ See Boulle’s discussion of the uses of mediation: Boulle, above n 39, 30-4.

⁴⁴ Such as the *Motor Accident Insurance Act 1994* (Qld) s 45 discussed in part 2.

⁴⁵ In its *Maintaining and Enhancing the Integrity of ADR Processes Report*, NADRAC classified all mediations which take place as a result of judicial or executive power, including those where the parties consent to exercise of that power, as mandatory. NADRAC reasoned that once a court or tribunal makes an order, ‘compliance with

make a distinction between private and mandatory mediations if consideration is given to increasing the standards of conduct for participants, for example, by imposing a good faith obligation upon them.⁴⁶ The distinction is not vital in the context of this exegesis because regardless of how mediation comes about, legal representatives are bound by the rules of conduct promulgated by the professional bodies to which they belong. However, legal representatives may agree to abide by higher standards of conduct (as a result of an agreement to mediate) or higher standards may be imposed upon them (by legislative directive to mediate). Both of these possibilities are considered in this submission.

Litigation is defined here as the process of adjudication of civil disputes by a court (or tribunal) within an adversary system of justice. I do not consider criminal trials in this exegesis. Nor do I examine arbitration, which is a process of private adjudication.

Occasional reference will be made to the acronym 'ADR'. Its most common usage is still 'Alternative Dispute Resolution' but there are many people and institutions who prefer to use the words 'additional', 'appropriate' or 'amicable' instead of 'alternative'.⁴⁷ My preference is simply to use the phrase 'dispute resolution' and I use it to encompass all processes that may bring about the peaceful resolution of a dispute.⁴⁸ And although some authors make a distinction between a 'conflict' and a 'dispute',⁴⁹ the terms are used interchangeably in this exegesis. I use the term 'legal disputes' to refer to disputes involving legal rights and obligations. The analysis in this exegesis is not restricted to the mediation of legal disputes but they are the kind of disputes for which legal representatives are most likely to be engaged. A distinction can also be drawn between the concepts of dispute 'settlement',

that order cannot properly be regarded as voluntary': *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, 34 [2.5]. The same reasoning applies to schemes such as that imposed on the parties under legislation such as the *Motor Accident Insurance Act 1994* (Qld).

⁴⁶ NADRAC approached the issue of conduct obligations for participants in ADR processes by reference to this classification making different recommendations with respect to mandatory and private processes: NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, 34 [2.5].

⁴⁷ Even international organisations, such as the International Chamber of Commerce (ICC) prefer the word "Amicable" to that of "Alternative". The ICC has defined ADR to mean 'amicable dispute resolution' and it includes, by definition, those processes where 'the decision reached by or in collaboration with the neutral is not binding upon the parties, unless they agree otherwise': Introduction to the ICC ADR Dispute Resolution Services, available at <<http://www.iccwbo.org/court/adr/>> accessed 29 May 2011.

⁴⁸ See Wolski, above n 15, 411 for discussion of relevant terminology.

⁴⁹ See, eg, Gregory Tillett and Brendan French, *Resolving Conflict: A Practical Approach* (Oxford University Press, 3rd ed, 2006) 8-9.

‘resolution’ and ‘management’,⁵⁰ but for simplicity sake, I use the term ‘resolution’ in its widest sense to encompass all of these concepts.⁵¹

In common with mediation, collaborative law is a process of negotiation but the negotiations take place without the aid of a mediator. In collaborative law, the parties and their lawyers commit themselves, through formal contract, to good faith collaborative negotiation to be conducted by a series of four-way meetings between the parties and their respective lawyers. Collaborative law’s most distinctive feature is ‘the lawyer disqualification provision’ - a provision whereby the parties agree that if settlement is not reached, their lawyers are to withdraw and be disqualified from representing them in that matter in litigation should either or both of the parties wish to take that course of action.⁵² The parties must engage new counsel in that event.

The term ‘values’ (or ‘value’) is central to a discussion about ethics in mediation and yet rarely is the term defined by those who use it. Boulle notes that there is some confusion of terminology in the literature in this area.⁵³ He finds that ‘there are interchangeable references to the “values”, “principles” and underlying “philosophy” of mediation.’⁵⁴ Many authors also use the terms ‘values’ and ‘objectives’ (or ‘goals’) interchangeable or they make joint references to ‘values and objectives’ without distinguishing between them.⁵⁵ These terms are defined below.

Preston defines ‘values’ as ‘those principles or attitudes to which we attribute worth (that is, we cherish or prize them). They become for us guidelines for action with moral significance (such as, “respect for life” or “diligence in work practices”)’.⁵⁶ Stuckey similarly defines values in the context of legal practice as the beliefs or principles that are important to

⁵⁰ For a discussion of these concepts, see Boulle, above n 39, 30-2.

⁵¹ For a discussion of relevant terminology, see Wolski, above n 15, 409.

⁵² On collaborative law generally, see Larry R Spain, ‘Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law’ (2004) 56 *Baylor Law Review* 141; and Fairman, above n 9. For further definitions of CL, see David A Hoffman, ‘Exploring the Boundaries and Terrain of ADR Practice: Mediation, Arbitration, and Collaborative Law’ (2007-2008) 14 *Dispute Resolution Magazine* 4-5.

⁵³ Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 2nd ed, 2005) 60.

⁵⁴ *Ibid.*

⁵⁵ Mendel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 430, 450; Spain, above n 52, 156; Burns, above n 2, 701.

⁵⁶ Preston, above n 19, 16. Also see the *Concise Oxford English Dictionary* which defines values as ‘principles or standards of behaviour’: Soanes and Stevenson, above n 18, 1597.

a group or to an individual and which are used as standards for evaluating ideas and behaviours.⁵⁷ Values can be attributed to persons or to social processes.⁵⁸ As regards the latter (social processes), one may talk for instance about the values of a process (such as mediation⁵⁹ and litigation⁶⁰) and the values of a lawyer's representation in a particular process.⁶¹ I have found that some of the authors who call for new rules of conduct compare the values of a process with the values of representation in a process. If processes are to be accurately compared, it is important to compare like with like ie the values of mediation (a process) must be compared with the values of litigation (a process) not with the values of representation (so called, adversarial representation) in a process.

Objectives or goals are the things we strive to achieve, for instance, through the use of mediation or litigation. There is a close correlation between objectives on the one hand and values on the other because normally, the objectives we seek to achieve would be considered 'worthy' – why else aim to achieve those things?

What is the purpose of these distinctions? Some over-claiming has been done in the case of mediation. Boule notes that, in relation to the many claims made for mediation, not all 'values' are values in the sense of being statements of fundamental principle. He makes a distinction between a number of aspects of mediation, 'namely its *features*, such as its flexibility and informality, its *values*, such as self-determination and the consensuality of outcomes, and its *objectives*, such as efficiency and effectiveness'.⁶² In the context of dispute resolution, the features of a particular process may be considered as 'the means by which we reach decisions';⁶³ or more generally, the means by which we attempt to achieve particular objectives. Many of the values claimed for mediation are in fact features of the process rather than values (albeit that they might promote certain values).⁶⁴ Boule notes further that '[i]t is

⁵⁷ Roy Stuckey et al, *Best Practices for Legal Education: A Vision and A Road Map* (Clinical Legal Education Association, 2007) 31.

⁵⁸ Boule, above n 39, 62.

⁵⁹ Spencer and Hardy, above n 1, 620; Frank Blechman, 'Ethics and Field Building: The Chicken and the Egg' (2002) 19 *Conflict Resolution Quarterly* 373, 373-376; Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass, 1994) 230.

⁶⁰ See, eg, Ellen E Sward, 'Values, Ideology, and the Evolution of the Adversary System' (1988-1989) 64 *Indiana Law Journal* 301; Stephan Landsman, 'A Brief Survey of the Development of the Adversary System' (1983) 44 *Ohio State Law Journal* 713.

⁶¹ Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 430.

⁶² Boule, above n 53, 60 (emphasis in original).

⁶³ Sward, above n 60, 303.

⁶⁴ Boule, above n 53, 60-1.

useful to differentiate among these aspects, though sometimes the same factor is both a value and an objective. For example, self-determination can be both a value of mediation and the objective behind two parties' choice of the process.'⁶⁵ In part 3 of the exegesis, I endeavour to make a distinction between these aspects of the various dispute resolution processes and I endeavour to compare like with like.

This research does not examine ethical issues which may arise following the conclusion of a mediation – issues such as the implementation, follow-through and enforcement of any agreement that might be reached in mediation.⁶⁶

1.6 Explanatory Overview and Organisation of the Exegesis

The exegesis is presented in seven parts. Part 2 examines the sources of legal ethical obligations for legal representatives in mediation in Australia and the United States. The discussion then centres on five ethical issues that arise in mediation from the perspective of legal representatives and suggests how those issues might be resolved using the current framework of law governing lawyers. The ethical issues considered are whether there are duties to make full and honest disclosure of relevant information, to act in good faith, to act cooperatively, to ensure fairness in process and/or outcome and, should these duties exist, which prevails in the event of conflict (and who decides which prevails, lawyer or client).

In formulating this list of ethical issues I have drawn upon literature pertaining to negotiation ethics.⁶⁷ For the most part, the authors of this material do not specify whether they are discussing unassisted and assisted negotiation (mediation) or just the former. Nonetheless, the literature is relevant given the widely adopted definition of mediation as a

⁶⁵ Ibid 60.

⁶⁶ Menkel-Meadow, above n 16, xxvi.

⁶⁷ There is an abundance of literature on ethics in negotiation although as Menkel-Meadow points out, 'many treatments of the subject focus almost exclusively on questions of deception, truth telling, and candor in negotiation': Menkel-Meadow, above n 16, xviii. For a list of some of the other ethical issues that arise in negotiation, see Menkel-Meadow, above n 16, xviii. Also see Jeffrey Z Rubin, 'Negotiation' (1983) 27 *American Behavioral Scientist* 135, 136-7; Burns, above n 2, 697. Burns transposes some of this literature to the mediation context and identifies issues of candour and lawyer/client authority as 'the most important ethics issues surrounding the mediations in which lawyers participate': Burns, above n 2, 692.

process of assisted or facilitated negotiation.⁶⁸ We can be confident that unassisted negotiation and mediation give rise to similar ethical dilemmas because both processes involve information exchange between two or more parties seeking to reach an agreement, with agreement being dependent on some degree of cooperation between the parties. A critical question though, is the extent to which mediation differs from unassisted negotiation, if at all, when it comes to resolving relevant ethical issues. Consideration must also be given to any ethical issues which may be unique to mediation.

Much of this work revolves around comparisons of a number of dispute resolution processes. In arguing for new rules of professional conduct for mediation, commentators inevitably draw comparisons between mediation on the one hand and litigation and unassisted negotiation on the other. Part 3 of the exegesis compares and contrasts the features, objectives and values of these dispute resolution processes. I single out two particular features of mediation which distinguish it from both litigation and unassisted negotiation and which ultimately provide reasons for retaining existing rule systems for legal representatives in mediation. The features are:

1. *The wide diversity of mediation practice.* Mediation is an extremely diverse process⁶⁹ which may take different forms and serve a range of different (and sometimes conflicting) objectives and values. It is more diverse than litigation which is heavily regulated by legislation, rules of court and practice directions. It is even more diverse than unassisted negotiation which tends, at least when lawyers are involved, to be highly ritualised.
2. *The capacity for influence, and the exercise of discretion, by mediators.* Despite the development of mediator standards of conduct, mediators may adopt different approaches to mediation and use a wide range of interventions, many of which have a profound impact on the course and outcome of mediation.⁷⁰ Mediator standards also allow mediators wide individual discretion in handling ethical matters that arise in the

⁶⁸ See, eg, Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, 1991) 14; Burns, above n 2, 691-2; Abramson, above n 6, 110. Also see Nolan-Haley who asserts that '[m]ediation is best understood as an extension of the negotiation process': Nolan-Haley, above n 6, 1371.

⁶⁹ Nolan-Haley, above n 6, 1379; Burns, above n 2, 701.

⁷⁰ Generally see Debra Shapiro, Rita Drieghe and Jeanne Brett, 'Mediator Behavior and the Outcome of Mediation' (1985) 41 *Journal of Social Issues* 101; Susan S Silbey and Sally E Merry, 'Mediator Settlement Strategies' (1986) 8 *Law & Policy* 7.

context of each mediation in which they participate.⁷¹ As a consequence, mediators may be more activist and influential than judges, even in today's environment of the 'managerial' judge.

In part 4 of the exegesis, I critically analyze the reasons given for, and the content of, a number of proposals for new 'non-adversarial' rules of conduct for lawyers representing parties in mediation. Suggestions for new rules centre on the ethical issues discussed in part 2: issues of disclosure, good faith, cooperation and fairness. It has also been suggested that legal representatives in mediation should adopt an interest-based approach to negotiation and act more like neutrals and less like adversarial advocates. Whilst I concede that lawyers in mediation may need to draw upon a different repertoire of skills than that needed in litigation, I reject the idea that their role in mediation is any different than it is in litigation: legal representatives in mediation still counsel, advise, negotiate and advocate for their clients.

In part 5, I offer some more general arguments in favour of maintaining the status quo with the general rules of conduct that currently govern the profession. The arguments are that:

1. The existing general rules of professional conduct are more appropriate than specific rules to govern conduct in highly contextual processes such as mediation.
2. It is appropriate and desirable for legal representatives to have the capacity to exercise discretion in relation to certain ethical matters in mediation. The matters over which they should retain discretion are those matters which proponents for new rules seek to regulate (or more heavily regulate than is presently the case).

In part 6, I critically examine collaborative law, the latest addition to the suite of dispute resolution procedures. Collaborative law provides a useful lens through which to examine some of the ethical dimensions of mediation - for participants in collaborative law explicitly agree to abide by many of the obligations which proponents for new rules seek to impose on legal representatives in mediation. I suggest that collaborative law has developed as a way to overcome problems inherent in concepts such as good faith participation. Arguably, all it has done is to create new ethical dilemmas.

⁷¹ MacFarlane, above n 31, 62.

I conclude the exegesis in part 7 with recommendations for improvement of the current rules of professional conduct in Australia and with some suggestions for further research.

In the remaining section of this part, I provide an overview of those of my published works on which I rely and a description of how they are connected to the research problem.

1.7 Published Works of the Candidate Integrated into the Exegesis

In this exegesis, I draw upon, integrate and extend a number of my published works, including the following articles and book:

1. 'The Role and Limitations of Fisher and Ury's Model of Interest-based Negotiation in Mediation' (1994) 5 *Australian Dispute Resolution Journal* 210-221. This article is based on a paper which I submitted towards fulfilment of the requirements of the degree of Masters of Law at Bond University. The contents of the article are updated in this exegesis. As its title suggests, the article explores the limitations of interest-based negotiation in mediation. Commentators who call for new non-adversarial rules of conduct for mediation assume that all mediations have the potential to be conducted, from beginning to end, on the basis of interest-based negotiation. However, as I demonstrate in this article, there are circumstances in which interest-based negotiation is neither possible nor desirable. Most negotiations ultimately involve some degree of positional or distributive negotiation where one more dollar for one party means one less dollar for the other. Accordingly, as is argued in part 4 of this exegesis, it is unrealistic to require legal representatives to use interest-based negotiation in mediation. In any event, as is also argued in part 4, interest-based negotiation is not more ethical or more appropriate in mediation than its counterpart, positional negotiation.
2. 'Culture, Society and Mediation in China and the West' (1996-97) 3 *Commercial Dispute Resolution Journal* 97-123. This article is also based on a paper which I submitted towards fulfilment of the requirements of the degree of Masters of Law at Bond University. Some authors who call for new non-adversarial rules for lawyers in mediation assert that ethics and codes of conduct should be derived from the

objectives and values on which mediation is premised. They assert the primacy, in mediation, of values such as personal autonomy and self-determination. This article demonstrates that these values are culturally situated. They are values that are prized in Western cultures. We should not be surprised therefore to find that the same values are claimed for litigation. In part 3 of this exegesis, I examine the processes of litigation, mediation and unassisted negotiation and conclude that the processes have more in common than is often acknowledged. This casts doubt on the claim that we need new professional conduct rules for mediation because it rests on fundamentally different objectives and values than litigation.

3. 'Voluntariness and Consensuality: Defining Characteristics of Mediation?' (1997) 15 *Australian Bar Review* 213-228. Proponents for new rules often compare the ideal functioning of one process (usually mediation) with the actual functioning of another (usually litigation). This article explores the extent to which mediation in practice (as opposed to mediation rhetoric) is founded on espoused values of voluntariness and consensuality. Drawing on a cross-cultural and historical analysis of mediation, I conclude that consensuality does not mean that the parties have an unfettered right to determine the outcome of mediation; voluntariness does not mean that the parties are without pressure to settle. The only element of mediation which remains consistent across time and cultures is the ability of the parties to accept or reject a particular outcome. In this exegesis, I compare and contrast the actual functioning (as opposed to the ideal functioning) of the various processes of dispute resolution.
4. 'Mediator Settlement Strategies: Winning Friends and Influencing People' (2001) 12 *Australasian Dispute Resolution Journal* 248-262. This article questions the concepts of mediator neutrality and impartiality. It is argued that mediators become a party to the negotiations into which they enter and that they influence the course and outcome of those negotiations. The article catalogues a range of strategies used by mediators to pressure parties to settle and to influence the course and outcome of mediations. It also identifies some of the contextual factors that influence mediator choice of strategies. There has been much debate in the literature about the use and appropriateness of evaluative strategies by mediators. In this exegesis, I argue that evaluative strategies are prevalent in mediation and that they may systematically

favour one party over the other. One of the tasks of legal representatives in mediation is to monitor and respond to this type of mediator intervention.

5. 'Reform of the Civil Justice System Two Decades Past – Implications for the Legal Profession and for Law Teachers' (2009) 21 *Bond Law Review* 192-232; and 'Reform of the Civil Justice System 25 Years Past – (In)Adequate Responses from Law Schools and Professional Associations? (and How Best to Change the Behaviour of Lawyers' (2011) 40 *Common Law World Review* 40-93. When proponents for new rules of conduct for mediation compare and contrast mediation with litigation, they often refer to an outdated version of litigation. These articles provide an overview of the reforms which have taken place in the civil justice systems of several common law jurisdictions in the last three decades: reforms such as the development of pre-litigation protocols, case management schemes and the institutionalization of mediation (and other forms of dispute resolution) within the court system. When I compare litigation and mediation in this exegesis, I take into account the reforms of the last several decades. Many of these reforms require responsive changes in the law school curriculum. The first of these articles canvasses the efforts made by law schools to integrate the teaching and learning of skills and values, including those associated with negotiation and mediation, into the curriculum. The second article questions whether law schools and professional associations have done enough to respond to the reforms.
6. 'Beyond Mooting: Designing an Advocacy, Ethics and Values Matrix for the Law School Curriculum' (2009) 19 *Legal Education Review*, 41-82; and 'Why, How and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate Law Curriculum' (2002) 52 *Journal of Legal Education* 287-302. These articles stress the importance of teaching a range of skills, values and ethics in the law school curriculum in an integrated, systematic and pervasive manner so that all students have an opportunity to develop skills incrementally and experientially in the safety of the law school environment.
7. *Skills, Ethics and Values for Legal Practice* (LawBook Co., Thomson Reuters, 2nd ed, 2009), chapters 1, 2, 3, 7, 8, 9 and 10. In this book, I examine a range of skills used by lawyers in performing their roles as advisers, counsellors, negotiators and advocates. I

also examine the ethical duties owed by lawyers to the court, clients and other parties under the law of lawyering with a specific focus on the duties owed in the contexts of negotiation, mediation, collaborative law and litigation. I discuss the core professional values imbued in the rules of professional conduct and examine a number of theories of legal ethics, some of which suggest that lawyers should be free to exercise discretion in ethical decision-making. All of these ‘themes’ are taken up in this exegesis. Most notably, in this exegesis, I identify and explore five central ethical issues for legal representatives in mediation and discuss how those issues might be resolved using the law of lawyering including existing rule systems for lawyers. I also argue the case for the exercise of discretion in ethical decision-making by drawing upon several theories of legal ethics discussed in the book.

I conclude the exegesis by drawing on concepts developed in two of my publications on Dispute Systems Design (DSD), a process involving the design and implementation of a series of procedures for handling disputes, rather than an individual procedure such as mediation.⁷² The principles of DSD suggest that the parties and their legal representatives may be encouraged to participate more constructively in mediation (assuming that they do not do so already) with education programs at the court and community levels and with appropriate skills training programs integrated within the law school curriculum (and in CLE activities). Education and training offer a better alternative to modify behaviour than the imposition of rules of conduct which are arguably unrealistic, and also impossible to monitor and enforce. The publications to which I refer are: *The Laws of Australia: Title 13, Dispute Resolution, Subtitle 13.6 Dispute Systems Design* (Law Book Co., 1997) 3-56; and ‘The Model Dispute Resolution Procedure for Australian Workplace Agreements: A Dispute Systems Design Perspective’ (1998) 10 *Bond Law Review* 7-38.

In the next part of the exegesis, I examine the legal ethical obligations of legal representatives in mediation.

⁷² This is the most common conceptualisation of a dispute resolution system. Generally see William L Ury, Jeanne M Brett and Stephen Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Program on Negotiation, Harvard Law School, 1993) 21; Bobette Wolski, *The Laws of Australia: Title 13, Dispute Resolution: Subtitle 13.6 Dispute Systems Design* (Law Book Co., 1997) 8 [2].

PART 2: THE LAW GOVERNING THE CONDUCT OF LEGAL REPRESENTATIVES IN MEDIATION

2.1 Sources of Legal Ethical Obligations for Lawyers

While there has been some debate about whether or not mediators are engaged in the practice of the law,⁷³ there is no doubt that a lawyer enters into a lawyer-client relationship⁷⁴ and practises law when he or she represents a client in mediation.⁷⁵ Consequently, in Australia and elsewhere,⁷⁶ the conduct of legal representatives in mediation is governed by the law of lawyering ie relevant portions of the law of contract, torts, equity, adjectival law,⁷⁷ general legislation,⁷⁸ legislation governing the practice of the law (in Australia, the Legal

⁷³ Some authors argue that mediators are not engaged in the practice of the law since they do not represent a particular party to a dispute and have no client in the traditional sense. See James K L Lawrence, 'Mediation Advocacy: Partnering with the Mediator' (1999-2000) 15 *Ohio State Journal on Dispute Resolution* 425, 438; Bruce Meyerson, 'Lawyers Who Mediator Are Not Practicing Law' (1996) 14 *Alternatives to High Cost of Litigation* 74, 75. Generally on this issue see Weckstein, above n 42, 528-9; Maureen E Laflin, 'Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators' (2000) 14 *Notre Dame Journal of Law, Ethics and Public Policy* 479, 499-505; Schuwerk, above n 2, 763; Joshua R Schwartz, 'Laymen Cannot Lawyer: But is Mediation the Practice of Law?' (1998-1999) 20 *Cardozo Law Review* 1715, 1746. However, while the ABA Section of Dispute Resolution took the view that mediating is not the practice of the law, it recognised that some activities eg offering legal opinions and drafting agreements clearly implicate the practice of the law and subject the lawyer's performance as a mediator to the general provisions of the professional practice rules: see ABA Section of Dispute Resolution, *Resolution on Mediation and the Unauthorized Practice of Law* (adopted by the Section on 2 February 2002). Menkel-Meadow expressed the same view sometime earlier: see Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 422-4. Also see Carrie Menkel-Meadow, 'The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice' (1996-1997) 10 *Georgetown Journal of Legal Ethics* 631, 653. Also, it appears that, in promulgating guidelines for the practice of mediation, some law societies and bar associations have treated 'mediations conducted by lawyers as a form of legal service': Laflin, 482.

⁷⁴ As Lamb and Littrich note, '[t]he lawyer's duty to a client only arises when the lawyer-client relationship has been established': Ainslie Lamb and John Littrich, *Lawyers in Australia* (Federation Press, 2007) 207.

⁷⁵ See Mark Richardson, 'Defining Legal Work' (2004) (June) *Law Society Journal* 63, 64.

⁷⁶ For a discussion of the position in the US, see Cooley, above n 6, 270; Peters, above n 6, 121. For a discussion of the position in the UK, see Boon and Levin, above n 2, 421.

⁷⁷ There are three main sources of adjectival law: legislation which establishes the court (and regulates its jurisdiction and procedure), its composition, administration and statutory powers (in Australia see, eg, the Supreme Court Acts in various states and territories); delegated legislation, that is, the Rules of Court devised by rules committees (which are composed of judicial officers and representatives of the government and the legal profession); and practice notes and directions made by the court pursuant to its inherent jurisdiction: Stephen Colbran et al, *Civil Procedure: Commentary and Materials* (LexisNexis Butterworths, 3rd ed, 2005) 6. The court also has inherent jurisdiction to supervise and sanction lawyers. For discussion on the foundation of these powers, see Nicolson, above n 19, 52; Paul L Haines, 'Restraining the Overly Zealous Advocate: Time for Judicial Intervention' (1989-1990) 65 *Indiana Law Journal* 445, 463; and Stephen Corones, Nigel Stobbs and Mark Thomas, *Professional Responsibility and Legal Ethics in Queensland* (Lawbook Co., 2008) 88-9.

⁷⁸ Regard must be paid to legislation such as the Australian Consumer Law which is set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), which is the new name for the *Trade Practices Act 1974* (Cth) and similar state and territory Fair Trading legislation.

Profession legislation),⁷⁹ together with the rules of conduct promulgated by the professional bodies to which lawyers belong (in Australia, the state and territory law societies and bar associations).⁸⁰ Some uniformity has been achieved in the rules in Australia due to the efforts of the Law Council of Australia⁸¹ (hereafter the LCA) and the Australian Bar Association, each of which has published model rules that have been adopted in the majority of Australian jurisdictions.⁸² At the time of writing, new national conduct rules have been developed by the LCA and the Australian Bar Association as a result of the National Legal Profession Reform Project.⁸³ These rules have yet to be finalised and adopted. Throughout this exegesis, reference is made to the existing rules (ie the *LCA Model Rules of Professional Conduct and Practice* (at 16 March 2002) [hereafter the LCA Model Rules or the Solicitors' Rules] and the *Australian Bar Association Model Rules* (at 8 December 2002) [hereafter the Barristers' Rules]) and to the draft new national rules for solicitors and barristers.⁸⁴ In addition to the general law,⁸⁵ the main source of regulation for lawyers in the US is the *American Bar Association Model Rules of Professional Conduct* (2004) (hereafter the ABA Model Rules) which have been adopted in whole or in part by most US states.⁸⁶

⁷⁹ At the time of writing, legal practice in Australia is still regulated by different state and territory legislation. Much of the legislation is modelled on the National Legal Professional Model Bill (now 2nd ed, 2006) and the National Legal Profession Model Regulations, at www.lawcouncil.asn.au/natpractice/currentstatus.html, promulgated in April 2004 by the Standing Committee of Attorneys-General (SCAG) of Model Provisions for the Legal Profession.

⁸⁰ Since the rules have a statutory foundation, they are considered 'a species of law': Boon and Levin, above n 2, 7.

⁸¹ The Law Council of Australia (hereafter LCA) is self described as Australia's peak national representative body of the Australian legal profession: http://www.lawcouncil.asn.au/about/about_home.cfm.

⁸² The LCA adopted a set of model rules, the *Model Rules of Professional Conduct and Practice* in March 2002 (hereafter the LCA Model Rules or the Solicitors' Rules). In 1993 the Australian Bar Association published a *Code of Conduct* as a framework for national uniformity. It was subsequently revised to form the *Australian Bar Association Model Rules* (hereafter the Barristers' Rules).

⁸³ A proposal for a new national legal profession Bill and Rules was put to the Council of Australian Governments (COAG) in April, 2010. Following a period of public consultation which ran from 14 May to 13 August 2010, the Taskforce reported back to COAG in February 2011. The proposal will be reconsidered by COAG at a later date (yet to be determined) following resolution of governance and funding issues: see COAG National Legal Profession Reform, Report of Meeting Outcomes, available at <http://www.ag.gov.au/legalprofession> (accessed 4/05/2011).

⁸⁴ Legal Profession National Rules – Solicitors' Rules 2010 under the Legal Profession National Law, Consultation Draft 14 May 2010 (hereafter draft Solicitors' Rules 2010); and Legal Profession National Rules – Barristers' Rules 2010 under the Legal Profession National Law, Consultation Draft 14 May 2010 (hereafter draft Barristers' Rules 2010).

⁸⁵ In the US, one needs to be cognisant of the American Law Institute's (ALI) *Restatement (Third) of the Law Governing Lawyers* (1998) which 'clarifies and synthesizes the common law applicable to the legal profession' (including aspects of the law of contract, torts and agency): see introduction to the Restatement. Although it appears as part of the Restatement Third series, there is no previous Restatement of this subject.

⁸⁶ As is the case with the model rules in Australia, the *American Bar Association Model Rules of Professional Conduct* (2004) (hereafter the ABA Model Rules) are not in and of themselves binding but the rules adopted in a particular state are enforceable against practitioners practising in that state. (The ABA Model Rules were first adopted by the ABA House of Delegates in 1983. Before the adoption of the Model Rules, the ABA model was

Generally, law societies and bar associations in Australia and the US have not promulgated additional or supplementary rules of conduct or guidelines to govern their members' conduct when they are acting as legal representatives in mediation.⁸⁷ There are two notable exceptions in Australia. The LCA published *Guidelines for Lawyers in Mediations* in 2007⁸⁸ while the Law Society of New South Wales promulgated *Professional Standards for Legal Representatives in a Mediation* in 1993, which standards have recently been updated.⁸⁹ The LCA guidelines are non-binding in nature⁹⁰ while the standards promulgated by the Law Society of New South Wales appear to establish a hybrid system. Non-binding guidelines and standards are not without influence on lawyers. In fact, most model rules contain some statements which are aspirational in nature. These statements may guide practitioners in selecting 'best practices' in conditions of uncertainty. They may also be taken into account by professional bodies and courts when they are assessing complaints against legal practitioners.⁹¹

One other accommodation for mediation has been made in the professional conduct rules in Australia: 'court' has been defined to include 'mediations'.⁹² The possible implications of this provision are discussed later in this part of the exegesis. No such accommodation has been made in the ABA Model Rules.⁹³

the 1969 Model Code of Professional Responsibility. The Model Code was preceded by the 1908 Canons of Professional Ethics).

⁸⁷ The ABA Model Rules are also silent on the subject of lawyers representing parties in mediation: see Fairman, above n 9, 519; Nolan-Haley, above n 6, 1377. Some guidance is offered in the US with respect to unassisted negotiation: see the American Bar Association *Ethical Guidelines for Settlement Negotiations* (2002). For discussion about the Guidelines, see Brian C Haussmann, 'The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic' (2003-2004) 89 *Cornell Law Review* 1218. The guidelines are not intended to be binding.

⁸⁸ LCA, *Guidelines for Lawyers in Mediation* (at March 2007).

⁸⁹ The Law Society of New South Wales, *Professional Standards for Legal Representatives in a Mediation* (at 1 January 2008).

⁹⁰ The guidelines do not impose any additional obligations on legal representatives; nor do they derogate from the usual obligations imposed on them: Introduction Note, LCA, *Guidelines for Lawyers in Mediation* (at March 2007). According to this Note, the guidelines were developed 'to give assistance to lawyers representing clients in the mediation of civil and commercial disputes'.

⁹¹ Boulle, above n 39, 468.

⁹² The LCA Model Rules and the Barristers' Rules define 'court' to mean any body described as such, a range of judicial and statutory tribunals, investigations and inquiries established by statute or a Parliament, Royal Commissions and 'arbitrations and mediations' (with the LCA Model Rules using the phrase 'an arbitration or mediation or any other form of dispute resolution'): Definition Sections, LCA Model Rules and Barristers' Rules. These definitions have been retained in the new draft National Rules.

⁹³ The ABA Model Rules provide that "'tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity': see Rule 1.0 Terminology.

There is presently no general national legislation in Australia governing the conduct of parties and their legal representatives in mediation. However, there is pressure at least at the federal level to impose statutory conduct obligations on participants in ADR processes as a result of recommendations recently made by NADRAC.⁹⁴ In the US, there has been some general legislative attempt to regulate behaviour in mediation with the promulgation of the *Uniform Mediation Act*.⁹⁵ However, the Act ‘does not purport to regulate the conduct of parties beyond confidentiality issues and enforcement of mediation agreements’.⁹⁶ In particular, it ‘does not attempt to regulate a party’s obligation to mediate in good faith, to act truthfully and with candor in the mediation process, or to maintain some minimal civility in dealing with the other participants in the mediation process.’⁹⁷ In short, it does not address the ethical issues discussed in this exegesis.

Additional conduct obligations may be accepted by the parties and their legal representatives by virtue of an agreement to mediate or other dispute resolution clause (in the case of private mediations) or imposed on them by specific statutory directives to mediate (in the case of mandatory mediations).

From these various sources, a number of obligations are imposed on lawyers. Foremost, they owe duties to the administration of justice, to their clients, and to third parties (including their opponents).⁹⁸

2.2 The Duties Owed by Lawyers

2.2.1 Duties Owed to the Administration of Justice

Lawyers owe a duty to the administration of justice.⁹⁹ This duty manifests itself in various ways. For instance, lawyers must not engage in conduct that is illegal or that is prejudicial to

⁹⁴ NADRAC recommended that ‘[w]here such a requirement does not already exist, legislation should be introduced which requires participants (disputants and their representatives) in mandatory ADR processes to participate in those processes in good faith’: *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, 38 [2.6.1]. NADRAC’s recommendations are discussed in more detail in part 4.

⁹⁵ Drafted by the National Conference of Commissioners on Uniform State Laws and by it approved and recommended for enactment in all US states in 2001.

⁹⁶ Bowie, above n 6, 34.

⁹⁷ Ibid.

⁹⁸ Nagorcka, Stanton and Wilson, above n 21, 451, 466. For a more detailed examination of the duties owed by lawyers to their clients, see Wolski, above n 15, 71-87.

the administration of justice.¹⁰⁰ They must obey and uphold the law and foster respect for the law and its administration. The most obvious aspect of the duty to the administration of justice is the duty that lawyers owe to the courts, tribunals and commissions of inquiry before whom they appear (hereafter, simply referred to as the ‘court’).¹⁰¹ It includes obligations to make responsible use of court process and privilege¹⁰² and to work to ensure the integrity of evidence.¹⁰³

Although the rules of professional conduct in Australia define ‘court’ to include ‘mediations’,¹⁰⁴ there is some difficulty in transposing relevant rules to the mediation context, a matter which will be discussed shortly.

2.2.2 Duties Owed to Clients

Lawyers owe their clients in mediation the same duties as they owe them in any other context,¹⁰⁵ namely, a duty of representation;¹⁰⁶ a duty to inform, advise and act on ‘lawful, proper and competent’ instructions;¹⁰⁷ a duty of competence and diligence;¹⁰⁸ a duty of

⁹⁹ See *Re Foster* (1950) 50 SR (NSW) 149, 151 discussed in Dal Pont, above n 25, 7-8. Generally, see Dal Pont, chs 17-19; Lamb and Littrich, above n 74, ch 15; Wolski, above n 15, 65-71.

¹⁰⁰ Dal Pont, above n 25, 423. See Part (A) of the general principles of professional conduct section of the Professional Conduct and Practice Rules 2005 of the Law Institute of Victoria Limited. The same wording appears in the objects clause of Queensland’s *Legal Profession (Solicitors) Rule 2007*.

¹⁰¹ See n 92. For a discussion of lawyers’ duties to the court, see David A Ipp, ‘Lawyers’ Duties to the Court’ (1998) 114 *Law Quarterly Review* 63.

¹⁰² LCA Model Rules r 16; Barristers’ Rules rr 35-40; draft Solicitors’ Rules 2010 r 21; draft Barristers’ Rules 2010 rr 59-67.

¹⁰³ LCA Model Rules r 17; Barristers’ Rules rr 43-50; draft Solicitors’ Rules 2010 rr 24-25; draft Barristers’ Rules 2010 rr 68-74.

¹⁰⁴ See above n 92.

¹⁰⁵ These obligations are also founded in contract (see *Astley v Austrust Ltd* (1999) 197 CLR 1, 22), tort (*Hawkins v Clayton* (1988) 164 CLR 539) and equity. See the discussion by Stephen Walmsley, Alister Abadee and Ben Zipser, *Professional Liability in Australia* (Lawbook Co., 2nd ed, 2007) 16, 117-8; Lamb and Littrich, above n 74, 269; Geoff Monahan and David Hipsley, *Essential Professional Conduct: Legal Ethics* (Routledge-Cavendish, 2nd ed, 2007) 82-3. For a useful discussion of a lawyer’s duties to a client within the context of negotiation, see Robert J Condlin, ‘Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role’ (1992) 51 *Maryland Law Review* 1, 71-8.

¹⁰⁶ Barristers’ Rules r 85; draft Barristers’ Rules 2010 rr 21-24. Lawyers who practise solely as barristers are obliged to accept work in accordance with a rule known as ‘the cab-rank rule’. In practice, solicitors operate in much the same way as do barristers. As a general rule, they will not turn away clients unless there is good cause for doing so. See Wolski, above n 15, 71-2 for a discussion of the duty of representation and of the operation of the cab-rank rule.

¹⁰⁷ LCA Model Rules r 12.2; Barristers’ Rules r 17; draft Solicitors’ Rules 2010 rr 7.1, 8.1, 13.1; draft Barristers’ Rules 2010 r 39.

¹⁰⁸ See LCA Model Rules r 1.1; draft Solicitors’ Rules 2010 rr 4.1.3, 7.1. Also see Barristers’ Rules r 16 and draft Barristers’ Rules 2010 r 37(a) which speak of ‘skill and diligence’. In the US, the ABA Model Rules r 1.3 provides that ‘[a] lawyer shall act with reasonable diligence ... in representing a client’. The terms ‘competence’, ‘skill’ and ‘diligence’ are not defined. However, ‘[a] “duty of competence” may be defined in a general way as a

loyalty (ie a duty to avoid a conflict of interest as between themselves and clients and as between clients and third parties);¹⁰⁹ and a duty to maintain the confidence of a client's affairs. The duty of confidentiality is subject to a number of exceptions eg disclosure is permitted when the client authorises it and when 'the practitioner is permitted or compelled by law to disclose' the information.¹¹⁰

The rules of conduct in most Australian jurisdictions currently impose a specific obligation on legal practitioners to inform clients (and where the practitioner is a barrister, to inform the instructing solicitor and client) about 'the reasonably available alternatives to fully contested adjudication'.¹¹¹ Although the ABA Model Rules make no explicit provision to this effect, several authors are of the view that the responsibility to advise clients about mediation and other alternatives to litigation arises from a combination of several provisions of the Rules.¹¹² Thus, lawyers should advise clients about the availability of mediation and other process options, and about the nature and purpose of mediation (and its potential advantages and disadvantages).¹¹³ They should assess cases for their suitability for mediation and if mediation is chosen by clients, they should discuss with clients and agree on the approach to be taken and the roles to be played at the mediation. They may need to encourage and prepare clients to play a central role in the mediation process.

duty to apply and integrate knowledge, skills, values and attitudes in such a way as to effectively perform the tasks required to complete a client's instructions': Wolski, above n 15, 78-9. On the concept of 'diligence', see Wolski, above n 15, 78-80. In the context of legal practice, Tobin defines 'competence' as 'the ability to perform a range of legal tasks and solve a range of legal problems according to measurable standards within the framework of the rules of conduct and ethics of the legal profession': Anthony G V Tobin, 'Criteria for the Design of Legal Training Programmes' (1987) 5 *Journal of Professional Legal Education* 55, 59.

¹⁰⁹ LCA Model Rules rr 4, 8-9; Barristers' Rules rr 87-89; draft Solicitors' Rules 2010 rr 10-11; draft Barristers' Rules 2010 rr 112-114; ABA Model Rules rr 1.7-1.10. The situation becomes a little more complex when lawyers move between roles: from legal representative to mediator, and from mediator to legal representative.

¹¹⁰ For a discussion about the scope of the duty of confidentiality, which varies depending on the source of the duty, see Dal pont, above n 25, 228-30. Also see the LCA Model Rules r 3; Barristers' Rules rr 103-106; draft Solicitors' Rules 2010 r 9.1; draft Barristers' Rules rr 108-111; ABA Model Rules r 1.6. For exceptions to the duty see, eg, LCA Model Rules r 3.1.2; Barristers Rules r 103; ABA Model Rule r 1.6 (b)(6). For a general discussion on the limits of, and exceptions to, lawyer-client confidentiality, see Dal Pont, above n 25, 230-7; Ross, above n 11, 363-76. For an example of circumstances in which lawyers might be compelled by law to disclose information, see *Proceeds of Crime Act 2002* (Cth) s 270.

¹¹¹ A practitioner is freed from this obligation in some circumstances. See, eg, LCA Model Rules r 12.3; Barristers' Rules r 17A.

¹¹² ABA Model Rules rr 1.2(a), 1.4(b), 3.2, 2.1. See, eg, Lawrence M Watson, 'Initiating the Settlement Process – Ethical Considerations' in Bernard and Garth, above n 3, 13; Carrie Menkel-Meadow, 'Ethics in ADR: The Many "C"s of Professional Responsibility and Dispute Resolution' (2000-2001) 28 *Fordham Urban Law Journal* 979, 981.

¹¹³ James H Stark, 'The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, From an Evaluative Lawyer Mediator' (1997) 38 *South Texas Law Review* 769, 788.

A lawyer should support his or her client in whatever way is necessary for the client to assume the role that the client chooses to take for participation in mediation.¹¹⁴ In most mediations, lawyers will relinquish their central role in presenting a client's 'case' to the client¹¹⁵ and play more of a support and advisory role. However, if a client does not feel confident enough to take centre stage at the mediation, the client's legal representative may speak on behalf of the client.

At every stage of a mediation, lawyers should advise clients of their legal rights and obligations, of options for settlement, of the consequences (legal and non-legal) of proposals for settlement, of the pros and cons of settling now and of the risks of not settling. If an agreement is reached, lawyers may draft and finalise it on their client's behalf.¹¹⁶

2.2.3 Duties Owed to Opponents and Other Third Parties

Lawyers also owe duties to their opponents and to others with whom they deal. The statement of general principle preceding the rules governing 'relations with other practitioners' in the LCA Model Rules captures the essential and ideal ingredients of relations between a lawyer and other persons: honesty, fairness and courtesy.¹¹⁷ It states:

In all of their dealings with other practitioners, practitioners should act with honesty, fairness and courtesy, and adhere faithfully to their undertakings, in order to transact lawfully and competently the business which they undertake for their clients in a manner that is consistent with the public interest.¹¹⁸

A similarly worded statement of general principle precedes the rules dealing with 'relations with third parties'.¹¹⁹ While these statements presently appear in preambles, the draft Solicitors' Rules 2010 contain a similar provision in the form of a rule. Rule 4.1.2 provides that solicitors must 'be honest and courteous in all dealings with clients, other

¹¹⁴ Gary Griedman and Jack Himmelstein, 'Deal Killer or Deal Saver: The Consulting Lawyer's Dilemma, (1997-1998) 4 *Dispute Resolution Magazine* 7, 8.

¹¹⁵ Nolan-Haley, above n 6, 1375. See Wolski, above n 15, 613-8 for a discussion of the role and functions of legal advisers in mediation.

¹¹⁶ The Law Society of New South Wales, *Professional Standards for Legal Representatives in a Mediation* (at 1 January 2008) s 2.2.

¹¹⁷ Wolski, above n 15, 87.

¹¹⁸ LCA Model Rules, statement of general principle preceding 'relations with other practitioners'. Also see rr 2-4 of the Barristers' Rules.

¹¹⁹ LCA Model Rules, statement of general principle preceding 'relations with third parties'.

solicitors, and third parties.’¹²⁰ Neither the existing rules nor the draft new rules define pivotal terms such as ‘honesty’, ‘fairness’ and ‘courtesy’. However, courts in Australia have affirmed that these general concepts can and will be applied and given meaning.¹²¹ It should be noted that the rules emphasise honesty, not openness. There is a difference in these concepts, as illustrated in the discussion which follows.

2.3 Common Ethical Issues

There is potential for conflict to arise between the duties owed to the administration of justice, those owed to a client and those owed to other persons. For instance, a client might ask his or her lawyer to withhold vital information from the other side in a mediation (the duty of confidentiality owed to the client potentially conflicts with the duty to be honest with the opponent) which might ultimately lead to the formation of an unfair agreement (the duty of loyalty to the client potentially conflicts with duties owed to the opponent and to the administration of justice).

In the discussion which follows, I identify five common ethical issues which arise in mediation from the perspective of legal representatives for the parties and suggest how those issues might be resolved using, in turn: the current rule systems which apply to lawyers (ie the various state and territory law society and bar association rules of professional conduct supplemented by guidelines such as the *LCA Guidelines for Lawyers in Mediations*); other components of the law of lawyering; and specific provisions which might apply by virtue of an agreement to mediate (in the case of private mediations) or legislative directive to mediate (in the case of mandatory mediations).

¹²⁰ In the US, see r 8.4 of the ABA Model Rules which contains a general prohibition against conduct ‘involving dishonesty, fraud, deceit or misrepresentation’. For a discussion of the position in the US, see Geoffrey C Hazard, Jr, ‘Lawyer for the Situation’ (2004-2005) 39 *Valparaiso University Law Review* 377, 377-379.

¹²¹ In *Lander v Council of the Law Society of the Australian Capital Territory* [2009] ACTSC 117 (11th September 2009) (Higgins CJ, Gray and Refshauge JJ), the court applied the general principles prefacing the sections ‘relations with third parties’ and ‘relations with other practitioners’ contained in the Legal Profession (Solicitors) Rules of the ACT to find that ‘there is an obligation on a practitioner to deal with all persons, practitioners or not, opponents or not, with honesty and fairness’ [43]. The court also held that ‘the question of courtesy is more difficult to assess. Courtesy connotes politeness. That clearly varies depending on the circumstances’: [43]. Also see *Legal Practitioners Complaints Committee and Fleming* [2006] WASAT 352 (7 December 2006) [72]-[73].

The issues are:

1. Is there a duty to be honest and open in mediation (or, more specifically, what is the appropriate level of honesty and openness required) and if so, to whom is the duty owed?
2. Is there a duty to participate in mediation in good faith and if so, what does good faith participation require?
3. Is there a separate duty to cooperate and if so, what does cooperation require?
4. Is there a duty to ensure a fair process and/or a fair outcome in mediation?
5. If the above duties exist and there is a conflict between them and duties owed to a client, how is the conflict to be resolved (or, in other words, how is the question of client authority versus lawyer independence to be resolved)?

I turn first to the issues of honesty and openness in mediation. For the purpose of the discussion which follows, unless stated otherwise, it is assumed that disclosure of the information in question cannot be compelled by operation of the law and that it does not fall within the scope of any of the usual exceptions to confidentiality provided under the rules.

2.4 Requirements in Relation to Honesty and Openness

2.4.1 The Rules of Professional Conduct

The rules of professional conduct regulating disclosure of information (I use the term ‘disclosure’ to encompass the concepts of honesty and openness) are relatively straightforward in the context of litigation. To begin with, a distinction is drawn in the rules between the duties of disclosure owed to the court and the duties of disclosure owed to one’s opponent.

In regard to the court, the rules provide a general prohibition against dishonesty.¹²² Legal practitioners must not knowingly make a misleading statement to the court on any matter (since advocates cannot express personal opinions on the merits of any material evidence or issue in a case before the court, this prohibition is aimed at assertions of law or fact)¹²³ and they are obliged to correct a misleading statement as soon as possible after becoming aware that it is misleading.¹²⁴ As for actual disclosure of information (ie openness or candour), a distinction is made between matters of law and matters of fact. A practitioner must inform the court (and as a consequence, the opposing party) of any relevant binding authorities and legislative provisions of which the practitioner is aware¹²⁵ but there is no obligation to disclose adverse facts and no obligation to ‘correct an error in a statement made to the court by the opponent or any other person’.¹²⁶ This is not to say that adverse facts should never be revealed to the court but that such disclosures cannot be made without client consent.¹²⁷

It is not clear how these rules apply in the context of mediation in Australia. The rules in Australian jurisdictions define ‘court’ to include ‘mediations’.¹²⁸ By this reference, the drafters of the rules might have meant mediators, the other parties to the mediation, or the mediation process. This uncertainty does not arise in the context of litigation because the ‘court’ to whom legal practitioners owe duties is personified by the judge, tribunal member or other official person (such as a court registrar) before whom legal practitioners appear. It is doubtful that the same thing can be said of mediation and mediators for all definitions of mediation emphasise the fact that it is a process – not an official institution.

¹²² In fact, the statement of general principle preceding the rules governing ‘advocacy and litigation’ in the LCA Model Rules provides that practitioners should act with ‘honesty and candour’ in all their dealing with the courts. However, the specific rules which follow are narrower in scope.

¹²³ LCA Model Rules rr 13.3, 14.1; Barristers’ Rules rr 20-21; draft Solicitors’ Rules 2010 r 19.1; draft Barristers’ Rules r 26. Also see ABA Model Rules r 3.3(a)(1) which specifically prohibits lawyers from making a false statement of fact or law. For discussion of instances in which legal practitioners have knowingly misled the court, see *Kyle v Legal Practitioners’ Complaints Committee* [1999] WASCA 115 (the practitioner concerned misled the court, in pleadings and in his opening statement, into the belief that a witness had executed certain documents); *Council of the Queensland Law Society v Wright* [2001] QCA 58 (amongst other things, the practitioner falsely informed the court that she had been unable to contact a potential witness and attempted to suborn the witness to swear a false affidavit); and *Legal Services Commission v Voll* [2008] LPT 001 (where the practitioner falsely represented to the Queensland Building Tribunal that his client was unable to attend the hearing because the witness was ‘stranded in Sydney’).

¹²⁴ LCA Model Rules r 14.2; Barristers’ Rules r 22; draft Solicitors’ Rules 2010 r 19.2; draft Barristers’ Rules r 27; ABA Model Rules r 3.3(a)(1).

¹²⁵ See, eg, LCA Model Rules r 14.6; Barristers’ Rules r 25; draft Solicitors’ Rules 2010 r 19.6; draft Barristers’ Rules 2010 r 31; ABA Model Rules r 3.3(a)(2).

¹²⁶ LCA Model Rules r 14.3; draft Solicitors’ Rules 2010 r 19.3. Also see ABA Model Rules r 3.3(a)(1).

¹²⁷ In this instance, the public interest in maintaining legal professional privilege outweighs the public interest in discovering the truth: Dal Pont, above n 25, 384, 386 (and 418-9 for the position of defence counsel).

¹²⁸ See definitions discussed above n 92.

Nonetheless, I think that the reference to ‘mediations’ in the Australian rules is intended to mean ‘mediators’. I think that the drafters of the rules intended that legal practitioners in Australia should owe mediators the same duties as they owe to judges. This is the most obvious interpretation of the definition section of the rules because:

1. It is difficult to conceive of practitioners owing duties to a process (although clearly, they may owe duties to certain persons, entities or even ‘the public’ involved in, or implicated by, a process).
2. It makes no sense that the reference to mediations is taken to mean ‘opponents’ or ‘counterparts’ since there are already rules in place governing relations with opponents and other third parties.

Assuming that the reference to ‘mediations’ should be taken to mean ‘mediators’, then legal representatives in Australia would be prohibited from knowingly making misleading statements to a mediator eg by making false assertions of law or fact. Given that the rules in Australia prohibit misleading *on any matter*,¹²⁹ it is possible that this prohibition even extends to the expression of opinions and to misrepresentations about matters such as a client’s settlement goals. As to openness or candour, legal representatives would have to inform a mediator of any relevant binding authorities and legislative provisions of which they are aware. As to whether disclosure has to be made in a joint session in the presence of the other party, as opposed to being made in a separate session in their absence, the rules are silent. This is not an issue which requires clarification in the context of litigation since ‘separate sessions’ are not a feature of litigation.¹³⁰ When a practitioner discloses adverse authorities and legislative provisions to a judge, he or she also discloses them to the opponent. In other respects, the duty of candour in mediation is limited. As with a court, legal representatives would not have to disclose adverse facts to a mediator; they would have no obligation to correct inaccurate statements made to the mediator by the other side and no obligation to correct false assumptions made by the mediator.

¹²⁹ This is the wording adopted in the Barristers’ Rules r 21.

¹³⁰ Ex parte applications may be heard in a very limited number of circumstances eg, when the situation is urgent, but then practitioners are subject to more rigorous disclosure obligations: see LCA Model Rules r 14.4; Barristers’ Rules r 24; draft Solicitors’ Rules 2010 r 19.4; draft Barristers’ Rules 2010 r 29.

This uncertainty over the disclosure rules as they relate to mediators does not arise with the professional conduct rules in the US. The ABA Model Rules do not define ‘tribunal’ to include mediation or mediator (and commentators agree that mediation does not fall within the definition of tribunal as it presently stands).¹³¹ The definition refers only to institutions or bodies that are adjudicative in nature.¹³² The rule which governs candour to a tribunal (rule 3.3 of the ABA Model Rules) also makes no reference to mediation and commentators agree that mediation would not qualify as a tribunal for the purpose of the rule ‘under even the most relaxed criteria’.¹³³ Given that the American Bar Association has held that rule 4.1 (which regulates ‘truthfulness’ to third parties) continues to apply in mediation, it seems unlikely that legal practitioners in the US owe any special duties of disclosure to mediators. There, under the existing rules, legal practitioners owe mediators the same duties of honesty and candour as they owe to their opponents. The extent of these duties is discussed immediately below.

As to the duties of disclosure owed to other practitioners and to third parties affected by the affairs of clients, the rules provide as follows:¹³⁴

1. In Australia, a legal practitioner must not knowingly, by some positive act, ‘make a false statement to the opponent in relation to the case (including its compromise)’.¹³⁵ The rule appears to prohibit all misrepresentations about any matter. However, it is suggested that this interpretation is too strict. Relevant case law suggests that legal practitioners will only fall foul of this rule if they misrepresent ‘material facts’.¹³⁶ Some ‘overstatement’ by lawyers on immaterial matters is envisaged by rule 28.1.2 of

¹³¹ Burns, above n 2, 705; Lawrence Fox, ‘Mediation Values and Lawyer Ethics: For the Ethical Lawyer the Latter Trumps the Former’ in Bernard and Garth, above n 3, 39, 50. The *Restatement (Third) of the Law Governing Lawyers* also gives no consideration to whether a mediation or a mediator would constitute a tribunal for the purpose of the rules.

¹³² See the definition of tribunal above n 92. In the UK, see Solicitors’ Code of Conduct 2007, r 24 which also restricts the definition of ‘court’ to adjudicative bodies.

¹³³ Alfini, above n 6, 269. The *Uniform Mediation Act* does not define court, but it does define ‘mediation’ as ‘a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute’ and it defines a ‘mediator’ as ‘an individual who conducts a mediation’ (s 2).

¹³⁴ For discussion of these provisions, see Wolski, above n 15, 546.

¹³⁵ See LCA Model Rules rr 18.1-18.3; Barristers’ Rules rr 51-53; draft Solicitors’ Rules 2010 rr 22.1-22.3; draft Barristers’ Rules 2010 rr 48-50. Also see LCA Model Rules r 28.1.1; draft Solicitors’ Rules 2010 r 34.1.1.

¹³⁶ See, eg, the cases of *Legal Practitioners Complaints Committee and Fleming* [2006] WASAT 352 (7 December 2006) [87] where a legal practitioner implied the existence of a valid will and concealed from a third party the status of the will (which was informal) to procure a covenant from that third party and *Legal Services Commissioner v Mullins* [2006] LPT 012 where the practitioner misrepresented the state of his client’s health (concealing the fact that his client had been diagnosed with cancer) a matter which was ‘critical to important parts of [its] claim’ [17].

the Solicitors' Rules which appears to allow misstatements (such as misstatements about the amount a client is willing to accept by way of settlement) as long as such misstatements do not 'grossly' exceed 'the legitimate assertion of the rights or entitlement of the practitioner's client' and by clause 6.2 of the *LCA Guidelines for Lawyers in Mediations* which warns practitioners to 'be careful of puffing' (but noticeably, does not prohibit puffing).

2. In the US, rule 4.1 (and commentary) of the ABA Model Rules prohibits a practitioner from making a false statement of material fact or law,¹³⁷ but specifically provides that statements about estimates of price or value placed on the subject of a transaction and about a party's intentions as to an acceptable settlement of a claim are not statements of material fact.¹³⁸
3. Additionally, the rules in both jurisdictions speak to actions, not omissions. While they prohibit certain misrepresentations, they require no affirmative disclosure.¹³⁹ A practitioner has no affirmative duty to inform an opposing party of relevant facts and law, subject to any requirements imposed by substantive and procedural law and relevant legislation.
4. If a practitioner makes a statement about a client's case which he or she subsequently learns to be false, the practitioner is under a duty to correct the statement.¹⁴⁰ A practitioner is not under a duty to correct an opponent where the opponent is acting on the basis of a mistaken belief that something is true or false – that is, there is no duty to correct an opponent's misunderstandings, misconceptions or false assumptions. This may be subject to exception if the draft Solicitors' Rules 2010 are adopted in

¹³⁷ The term 'material' in r 4.1 of the ABA Model Rules is not defined directly. Peters argues that the term would take its meaning from the law of contract and torts such that a representation will be material if it would induce reasonable persons to enter into an agreement: Peters, above n 6, 128. Determination of this issue will generally require a 'case-specific inquiry': Douglas R Richmond, 'Lawyers' Professional Responsibilities and Liabilities in Negotiations (2009) 22 *Georgetown Journal of Legal Ethics* 249, 297.

¹³⁸ ABA Model Rules rr 1.6, 4.1. Also see Burns, above n 2, 695-6; Geoffrey C Hazard, Jr, 'The Lawyer's Obligation to be Trustworthy When Dealing With Opposing Parties' (1981-1982) 33 *South Carolina Law Review* 181, 189; Jacqueline M Nolan-Haley, *Alternative Dispute Resolution* (Thomson West, 2008, 3rd ed) 115-6.

¹³⁹ Corones, Stobbs and Thomas, above n 77, 148-9; Hazard, above n 138, 189. Also see *Beach Petroleum NL and Another v Johnson and Others* (1993) 11 ACSR 103 [22.60] (Von Doussa J).

¹⁴⁰ LCA Model Rules r 18.2; Barristers' Rules r 52; draft Solicitors' Rules 2010 r 22.2; draft Barristers' Rules 2010 r 49.

Australia. Rule 30.1 provides that '[a] solicitor must not take unfair advantage of another solicitor's obvious error, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact'. Ironically, it is only in cases of obvious error that this provision is activated.

When set in the context of mediation, the thrust of the relevant rules is that legal representatives cannot knowingly make false statements about material facts or law to their opponents.¹⁴¹ If they make a statement to their opponent and subsequently discover the statement to be false, they must correct it. However, subject to any requirements imposed by substantive law and relevant legislation, they can exaggerate values and bottom lines and they can misrepresent their client's negotiation strategy and willingness to settle.¹⁴² Again, subject to any requirements imposed by substantive law and relevant legislation, legal representatives do not owe their opponent a duty of candour or openness. The rules do not prohibit 'silence', unwillingness to present a client's case or refusal to make an offer to settle. Legal representatives have no obligation to volunteer information to the other side; nor do they have to correct the other side's misunderstandings or analytical errors.¹⁴³ They can take full advantage of the other side's ignorance of the facts and law. Each party (and his or her representative) is expected to conduct their own legal research and factual investigations. These duties do not vary according to whether the other party has representation.¹⁴⁴

¹⁴¹ See Wolski, above n 15, 544-50, 634 for a discussion of the application of the relevant rules in mediation. There is little doubt that r 4.1 of the ABA Model Rules applies to mediation in the US. On 12 April 2006, the ABA's Standing Committee on Ethics and Professional Responsibility reiterated its commitment to the puffing exception in r 4.1 and explicitly expanded it to apply to caucused mediation: see ABA Formal Opinion 06-439 discussed in Christopher M Fairman, 'Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics' (2007-2008) 30 *Campbell Law Review* 237, 269; Carrie Menkel-Meadow, 'The Lawyer as Consensus Builder: Ethics for A New Practice' (2002-2003) 70 *Tennessee Law Review* 63, 86; Cooley, above n 6, 270; Peters, above n 6, 121. However, at least one author argues that the Committee's conclusion in regard to the application of r 4.1 is debatable: Richmond, above n 137, 289.

¹⁴² Wolski, above n 15, 546-7.

¹⁴³ See LCA Model Rules r 18.3; draft Solicitors' Rules 2010 r 22.3. Also see Condlin, above n 105, 78. A lawyer cannot however take advantage of the other side's misunderstanding or misconception when he or she 'was the moving force ... in the other side's misconception': see *Legal Practitioners Complaints Committee and Fleming* [2006] WASAT 352 (7 December 2006) [66]. In this case, a legal practitioner induced potential beneficiaries under a deceased person's estate to agree not to make claims on the estate by referring to an informal document as the deceased's 'will' when no formal will had in fact been executed. Also see *Chamberlain v Law Society of the Australian Capital Territory* (1993) 43 FCR 148, where the practitioner deliberately took advantage of an obvious error (a misplaced decimal point) in a writ issued against him by the Deputy Commissioner of Taxation and 'set in train the events and documents which ... led to the entry of the [erroneous] consent judgment': [49] (Lockhart J).

¹⁴⁴ Hazard, above n 138, 182. Also see Dal Pont's discussion on professional duties to unrepresented parties: Dal Pont, above n 25, 496. As Dal Pont points out, legal practitioners must take special care to ensure that unrepresented litigants are not unfairly disadvantaged or subject to undue pressure.

Burns reaches the same conclusions about the rules governing this issue in the United States. He concludes that the following behaviour is permitted under the ABA Model Rules:¹⁴⁵

1. Refusing to answer specific questions of fact which might reveal the interests of one's client;
2. Failing to correct the opponent's misunderstandings of fact or law that favour one's position while being scrupulous about not endorsing the misunderstanding;
3. Actively misleading the opponent as to one's bottom line and one's eagerness to settle through false statements of immaterial facts and other negotiation behaviours.

The most notable recent cases in Australia involving 'lack of appropriate disclosure' by legal representatives in mediation are the cases of *Mullins* and *Garrett*.¹⁴⁶ Mullins (a barrister) was briefed by Garrett (a solicitor) to represent the plaintiff in a claim for personal injuries caused as a result of a motor vehicle accident. Legislation (the *Motor Accident Insurance Act 1994* (Qld)) mandates the exchange of extensive information and a compulsory settlement conference which, with the agreement of the parties, may be mediated.¹⁴⁷ The parties had exchanged information (including, from the plaintiff, expert reports detailing assumptions about life expectancy and estimates of losses and future care needs based on those assumptions) and the matter had been scheduled for mediation. Just days before the mediation was due to commence, the plaintiff advised his lawyers that he had been diagnosed with cancer unrelated to the incident which gave rise to the claim. It was likely that the cancer would further reduce his life expectancy. Despite the change in circumstances, Mullins prepared a document entitled 'Plaintiff's Outline of Argument at Mediation' that included a schedule of damages based on the earlier expert reports and assumptions and furnished the Outline to the defendant's lawyers. The information about the plaintiff's cancer diagnosis was not disclosed in telephone conversations between Mullins and the defendant's lawyers or at the mediation and the insurer settled in ignorance of it. The insurer commenced action to recover the sum paid to the plaintiff after the plaintiff died. The insurer's claim was settled without trial but disciplinary proceedings were brought against both practitioners (in separate proceedings) for knowingly misleading the insurer and its lawyers about the plaintiff's life

¹⁴⁵ Burns, above n 2, 694. Also see Wolski, above n 15, 546-7.

¹⁴⁶ *Legal Services Commissioner v Mullins* [2006] LPT 012; *Legal Services Commissioner v Garrett* [2009] LPT 12. These cases arose out of the same facts: Mr Mullins was retained as counsel while Mr Garrett was the instructing solicitor.

¹⁴⁷ *Motor Accident Insurance Act 1994* (Qld) ss 45, 51A, 51B.

expectancy. Had the mediation been postponed or delayed for more than two weeks, the information would have had to have been disclosed in accordance with the legislative scheme - the legislation required that the insurer be informed of any significant change in the claimant's medical condition within 1 month of the claimant becoming aware of the change.¹⁴⁸ The mediation took place before the expiration of this period. Consequently the claimant was not in breach of the relevant provision of the legislation. Nonetheless both legal practitioners were found to have intentionally and fraudulently deceived the insurer and its lawyers about the accuracy of fundamental assumptions made in respect of life expectancy ie about a material fact, and fined for professional misconduct.

With the benefit of hindsight, it seems clear where the practitioners went wrong. At the mediation (and in the telephone conversation leading up to the mediation), Mullins made statements such as 'the claim for future care set out in [document] was very reasonable'; and 'the claim for economic loss was based upon the [report]'.¹⁴⁹ Mullins continued to rely on, and refer to, the reports although the information they contained was no longer accurate.¹⁵⁰ The case against Mr Garrett was slightly different in that he remained silent at the mediation. It was held that he had independent responsibility throughout the mediation and that in remaining silent, he practised a fraudulent deception (analogous to that committed by Mr Mullins) on the insurer and its lawyers.¹⁵¹

Unfortunately neither case gives a detailed account of the rules of disclosure governing legal representatives in mediation. In each case, the Tribunal was directly concerned with the duty of disclosure owed by a legal practitioner to an opponent. At the proceedings against Mullins, Byrne J (who together with two lay members, constituted the Legal Practice Tribunal) pointed to the existence of rules 51 and 52 of the Queensland Bar Rules¹⁵² and concluded that Mullins could not have approached the mediation on the basis that he was entering an 'honesty-free zone'.¹⁵³ The Tribunal was clearly of the view that parties to negotiation – even in a negotiation 'tinged with a commercial aspect' – should be afforded 'a

¹⁴⁸ Ibid s 45.

¹⁴⁹ *Legal Services Commissioner v Mullins* [2006] LPT 012, 4 [14].

¹⁵⁰ Ibid 8 [34].

¹⁵¹ *Legal Services Commissioner v Garrett* [2009] LPT 12, 6 [25], 7 [34].

¹⁵² These were in the same terms as rr 51 and 52 of the Australian Bar Association Model Rules (or Barristers' Rules), prohibiting barristers from knowingly making a false statement to the opponent in relation to the case (including its compromise) and requiring them to take all necessary steps to correct any false statement as soon as possible after becoming aware that the statement was false.

¹⁵³ *Legal Services Commissioner v Mullins* [2006] LPT 012, 7 [29].

measure of honesty from each other'.¹⁵⁴ Also of significance is the fact that the Tribunal did not confine the application of the relevant professional rules (rules 51 and 52) to the context of advocacy and litigation although the rules in question only appear within that particular category of the rules.

Pointedly, Byrne J observed that Mullins, who sought advice on the issue from senior counsel before the mediation commenced, posed the wrong questions when conducting his research. His Honour continued:

Supposing that no more candour was to be expected of him at this mediation than of an advocate in court, the respondent inquired of a senior colleague whether, at a trial, a plaintiff's barrister had to lead evidence of contingencies that adversely affect the client's claim - missing the significance of his continuing reliance on the life expectancy assumption.¹⁵⁵

His Honour's comment suggests that different rules of candour might apply in mediation than those that apply in court. Unfortunately, His Honour did not elaborate. He mentions the duty of disclosure owed to the court only in passing in a footnote.¹⁵⁶

In my opinion, there was no need for the Tribunal in *Mullins*' case to distinguish between litigation and mediation. Mullins ought not to have continued to rely on the by-now inaccurate reports whether he was appearing in litigation or in mediation. A distinguishing fact in both cases is that the practitioners had made representations to the opponent prior to the mediation and that those representations, which were 'critical to important parts of the claim',¹⁵⁷ and relied upon by the defendant, had become false by the time the mediation was conducted, a fact known to both Mullins and Garrett. Garrett was in breach of the existing professional conduct rules because he failed to correct those statements. Mullins was in breach of the rules because he did not correct those statements and because he relied on those statements again at mediation.

¹⁵⁴ Ibid 6 [27].

¹⁵⁵ Ibid 8 [34].

¹⁵⁶ Ibid 7 [29], footnote 18. His Honour notes that the definition of 'court' in the rules includes 'mediations' but he did not elaborate on the meaning to be given to the term 'mediations'.

¹⁵⁷ Ibid 4 [17]. For further analysis of the case of *Mullins*, see Kay Lauchland, 'Secrets, Half Truths and Deceit in Mediation and Negotiation – Lawyers Beware' (2007) 9 *ADR Bulletin* 97; Reid Mortensen, 'Ethics in Negotiations and ADR' (2007) (February) *Proctor* 10-11; Gino Dal Pont, 'To Disclose or Not to Disclose' (2007) (April) *Law Society Journal* 28.

Despite the minimalist formulation of the law of disclosure in the rules of professional conduct, cases such as those of *Mullins* and *Garrett* demonstrate that it will not always be appropriate or justifiable to exploit an opponent's ignorance of material facts. As the discussion later in this part of the exegesis illustrates, there may be other circumstances in which disclosure of information to one's opponent in mediation is required in order to discharge one's duty of fairness and the duty to the administration of justice.

2.4.2 Other Components of the Law of Lawyering

Lawyers also owe duties of 'disclosure' to the court and to third parties with whom they deal, by virtue of the general law. As regards the court, '[t]he general rule appears to be that a passive withholding of material is permissible, but the active concealment or misleading of the court is prohibited'.¹⁵⁸ As regards one's opponent or counterpart in negotiation, while lawyers must refrain from making false statements, they generally have no obligation to reveal relevant information to their opponent. Such information is considered to be confidential and should only be disclosed to an opponent with client consent.

Parties in arms length commercial negotiations are assumed to have conflicting interests. Generally there is no obligation for one party to reveal to the other information of which they are aware, which, if known to the other might cause that party to take a different negotiation stance. Failure to do so would not, without more, ordinarily be regarded as dishonesty or even sharp practice.¹⁵⁹

¹⁵⁸ Ross, above n 11, 562. For a discussion of the relevant case law including the decisions in *Myers v Elman* [1940] AC 282, *Tomblin v Universal Bulb Co Ltd* [1951] 2 TLR 289, *Meek v Fleming* [1961] 2 QB 366 and *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, see Ross, above n 11, 563-4 and Ipp, above n 101, 67-9.

¹⁵⁹ David Higgs, 'Ethical Settlement Negotiation' (2009) (Winter) *Bar News, Journal of the NSW Bar Association* 60, 60. Richmond asserts that this general rule is subject to

four regular exceptions. First, a lawyer must reveal a client's death. Second, a lawyer has a duty to disclose that a writing does not reflect the parties' agreement. Third, a lawyer has a duty to disclose clearly applicable insurance coverage. Fourth, although a closer call, an attorney has a duty to disclose material facts (other than confidential client information) when he knows that an opponent is laboring under a clearly mistaken belief that, if uncorrected, will substantially deprive the opponent of the benefit of its bargain, or will materially lessen that benefit.

Richmond, above n 137, 282 (citations omitted).

However, in some instances, an affirmative disclosure duty is imposed eg when a party makes a partial disclosure that is or becomes misleading in light of all the facts, and ‘when the nondisclosing party has vital information about the transaction not accessible to the other side’.¹⁶⁰

Additionally, some misrepresentations by lawyers (and others) are prohibited by the law of fraud, the law with respect to unconscionability, and the provisions of general legislation such as the *Australian Consumer Law* (ACL) dealing with misleading and deceptive conduct.

A statement or bargaining move ‘is fraudulent when the speaker makes a knowing misrepresentation of a material fact on which the victim reasonably relies and which causes the victim damage’.¹⁶¹ The law of fraud distinguishes between representations of fact and representations of opinion. While factual misrepresentations are not permitted, statements of opinion are permissible in some circumstances. Carter, Peden and Tolhurst note that:

[a] misrepresentation is a representation which does not accord with true facts (past or present). Therefore, promises or assurances for the future, statements of intention, expressions of opinion, advertising “puffs”, and representations of law have all, on occasions, been distinguished from the representation of fact essential to an operative misrepresentation.¹⁶²

¹⁶⁰ Shell, above n 28, 60. As Carter, Peden and Tolhurst note, ‘a statement which is literally true may be a misrepresentation because it gives a false impression by not telling the whole truth’: J W Carter, Elisabeth Peden and G J Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 5th ed, 2007) 374. The position is the same under the rules of professional conduct: see Peters, above n 6, 122 and *Legal Practitioners Complaints Committee and Fleming* [2006] WASAT 352 (7 December 2006) [66].

¹⁶¹ Shell, above n 22, 201; Shell, above n 28, 58. Also see Eleanor Holmes Norton, ‘Bargaining and the Ethic of Process’ (1989) 64 *New York University Law Review* 493, 547; Russell Korobkin, Michael L Moffitt and Nancy A Welsh, ‘The Law of Bargaining’ in Andrea K Schneider and Christopher Honeyman (eds), *The Negotiator’s Fieldbook* (American Bar Association Section of Dispute Resolution, 2006) 183, 183-4. On the elements of fraudulent misrepresentation, see Carter, Peden and Tolhurst, above n 160, 367-80 and Peter Gillies and Niloufer Selvadurai, *Law of Contract* (Federation Press, 2009) 123-31. A party who suffers loss or damage might also have other remedies available at common law (eg, for negligent misstatement: Carter, Peden and Tolhurst, above n 160, 382-8; Frances McGlone and Amanda Stickley, *Australian Torts Law* (LexisNexis Butterworths, 2nd ed, 2009) 400-16 or for the tort of deceit: see McGlone and Stickley: 417-23) and in equity (eg the equitable remedy of ‘estoppel’).

¹⁶² Carter, Peden and Tolhurst, above n 160, 369. On other occasions though, statements of intention and opinion have been held to be a fraudulent misrepresentation eg if the person does not hold the intention or opinion professed: see Carter, Peden and Tolhurst, 371. Also see the circumstances in which a statement of opinion may be treated as an implied statement of fact: Gillies and Selvadurai, above n 161, 125.

Additionally, statements about demands and bottom lines are not, as a matter of law, considered ‘material’ to a deal.¹⁶³ It is also recognised that statements in relation to value and settlement intentions are common and that ‘no reasonable negotiator would rely upon them’.¹⁶⁴ Thus, there is a wide range of matters with respect to which honesty is not required.

Unconscionability occurs when there is a belief that there is no reasonable probability that one of the contracting parties will fully perform; when there is knowledge that one of the parties will not substantially benefit from the transaction or is unable to protect his or her own interests because of physical or mental infirmity or other disability; or when there is gross overpricing relative to ready availability elsewhere.¹⁶⁵ As Norton notes, the doctrine of unconscionability ‘seeks extreme situations, not every-day bargaining unfairness between people who are roughly equal.’¹⁶⁶

While silence is generally not caught by the relevant professional conduct rules, it was caught by section 52 of the *Trade Practices Act 1974* (Cth) [hereafter the TPA] and its state and territory Fair Trading Act equivalents.¹⁶⁷ It would appear that it is also caught by section 18 of the *Australian Consumer Law* which is in substantially the same terms ie prohibiting a person, in trade or commerce, from engaging in conduct that is misleading or deceptive or likely to be so.¹⁶⁸ In relation to section 52 of the TPA, Corones asserts that courts will look at the surrounding circumstances to ‘determine whether they give rise to a “reasonable expectation” of disclosure’.¹⁶⁹ Such a determination will generally depend on case-specific

¹⁶³ Shell, above n 28, 61.

¹⁶⁴ Scott R Peppet, ‘Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining’ (2002) 7 *Harvard Negotiation Law Review* 83, 91. Also see Korobkin, Moffitt and Welsh, above n 161, 184.

¹⁶⁵ Norton, above n 161, 552-3.

¹⁶⁶ Norton, above n 161, 557. For a discussion of the modern case law in Australia and the variety of circumstances which might adversely affect a party, see Carter, Peden and Tolhurst, above n 160, 519-25.

¹⁶⁷ The term ‘conduct’ was defined expansively in s 4(2) of the *Trade Practices Act 1974* (Cth) and similar provisions in the state/territory Fair Trading Acts to include refraining from acting (otherwise than inadvertently), so it included silence and half-truths: Stephen G Corones, ‘Solicitors’ Liability for Misleading Conduct’ (1998) 72 *Australian Law Journal* 775, 776; Carter, Peden and Tolhurst, above n 160, 417, 419-20.

¹⁶⁸ The Australian Consumer Law forms part of the Competition and Consumer Act 2010 (see Schedule 2 of the Act) formerly known as the *Trade Practices Act 1974* (Cth) s 52. It replaces previous Commonwealth, state and territory consumer protection legislation. Although the new legislation does not define ‘conduct’, the High Court ‘has found that the ambit of “conduct” is not limited to a positive action or representation, and that silence can be considered misleading or deceptive in certain circumstances’: *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, taken from ‘Explanatory Memorandum, circulated in the House of Representatives, the Parliament of the Commonwealth of Australia, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010. Also see *Civil Procedure Act 2010* (Vic) s 21 which subjects participants to an overarching obligation to refrain from conduct which is misleading or deceptive or likely to be so

¹⁶⁹ Corones, above n 167, 776. Also see Warren Pengilly, “‘But You Can’t Do That Any More!’ – The Effect of Section 52 on Common Negotiation Techniques’ (1993) 1 *Trade Practices Law Journal* 113, 119, 121 for a

factors. Corones submits ‘that in settlement negotiations no reasonable expectation would arise on the part of the other party that the solicitor will reveal the maximum amount for which the client is prepared to settle.’¹⁷⁰ In fact, section 52 seems to have allowed for many of the types of deceptive tactics common in negotiation: it ‘allows for certain levels of deception, such as opinions that might inadvertently turn out to be false and subjective assessments of products and services’.¹⁷¹ Presumably the same will be the case for section 18 of the *Australian Consumer Law*.

In addition to obligations imposed by substantive law, various obligations for disclosure exist by virtue of procedural law (and in some cases, specific statutory schemes).¹⁷² Perhaps the most well known examples are the obligations imposed by civil procedure rules. The relevant rules of court compel parties to litigation to disclose and provide for inspection copies of *documents* which are or have been in their possession or control and are relevant to an allegation in issue.¹⁷³ There are also mechanisms via which one party to litigation can compulsorily acquire information from the other parties through ‘interrogatories’ requiring sworn written answers.¹⁷⁴

The obligation to disclose documents and answer interrogatories generally rests on the parties. However, lawyers are subject to a number of obligations in respect of these procedures eg they must explain the duty of disclosure of documents to clients, advise clients not to destroy relevant documents, make an independent assessment about whether full discovery has been made, and in some jurisdictions, certify before or at trial that the party has

list of circumstances where silence may give rise to liability under former s 52 *Trade Practices Act 1974* (Cth). For a discussion of recent developments in the law relating to matters such as misleading and deceptive conduct, negligent misstatement, equitable estoppels and unconscionable conduct, see Andrew Stewart and Leanne McClurg, ‘Playing Your Cards Right: Obligations of Disclosure in Commercial Negotiations’, (updated version, paper presented at the AMPLA Conference 2007).

¹⁷⁰ Corones, above n 167, 784.

¹⁷¹ Pengally, above n 169, 114.

¹⁷² See, eg, the *Motor Accident Insurance Act 1994* (Qld) which mandates the exchange of extensive information.

¹⁷³ The mechanisms by which discovery is initiated and the exact scope of the duty of discovery, varies between jurisdictions. In some jurisdictions, it is automatic, triggered at a certain stage in the proceedings (see, eg, the *Uniform Civil Procedure Rules 1999* (Qld) rr 209-225). In other jurisdictions, parties have to apply to the court for an order for discovery (see, eg, *Uniform Civil Procedure Rules 2005* (NSW) r 21.2) or obtain the leave of the Court to file and serve a notice for discovery (see the *Federal Court Rules 1979* (Cth) O 15 r 1). For an overview of ‘discovery laws’ pertaining to federal courts in Australia, see Australian Law Reform Commission, *Managing Discovery: Discovery of Documents in Federal Courts*, Report No 115 (2011) Chapter 4. More generally, for discussion on the obligations of lawyers in discovery, see Ross, above n 11, 559; David Bamford, *Principles of Civil Litigation* (Lawbook Co., Thomson Reuters, 2010) 180-5.

¹⁷⁴ See, eg, the provisions of the *Uniform Civil Procedure Rules 1999* (Qld) rr 228-232; *Uniform Civil Procedure Rules 2005* (NSW) rr 22.1-22.3. Generally, see Bamford, above n 173, 183-4.

been fully appraised of its obligations to provide discovery and that the practitioner is not aware of any documents which have not been disclosed as required.¹⁷⁵

This is not to say that all information held by one party is available to the other parties to litigation under these rules. The duty of disclosure does not apply to documents or information in relation to which there is a valid claim to privilege.¹⁷⁶ A number of common law privileges protect confidential client information from disclosure. Many of these privileges have been codified, albeit that the scope of some of the privileges has been narrowed.¹⁷⁷ Many, if not most, communications that take place between a lawyer and his or her client in preparation for mediation will be protected from disclosure by legal professional privilege (either the advice limb or the litigation limb)¹⁷⁸ and would thus not be the subject of compulsory disclosure unless of course, the privilege has been ousted by statute, or is waived by the client.

2.4.3 Agreements and Legislative Directives to Mediate

Some agreements to mediate require the parties to exchange with each other and to provide to the mediator lists of issues in dispute, expert reports and other evaluations to support their claims.¹⁷⁹ In these circumstances, there is a contractual obligation to disclose

¹⁷⁵ See, eg, *Legal Profession Regulation 2005* (NSW) reg 177; *Civil Procedure Act 2010* (Vic) ss 13(2), 26. Also see the discussion by Bamford, above n 173, 180.

¹⁷⁶ See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 212(1) (in relation to documents) and r 233 (in relation to questions posed in interrogatories). Also see *Uniform Civil Procedure Rules 2005* (NSW) r 22.2. Communications will generally be protected if they fall within the scope of legal professional privilege (or client legal privilege), settlement privilege, privilege against self-incrimination and public interest privilege or immunity. Generally see Bamford, above n 173, 189-93; Gordon D Lewis, Emiliios J Kyrou and Albert M Dinelli, *Handy Hints on Legal Practice* (Lawbook Co., 3rd ed, 2004) 54-5; Lamb and Littrich, above n 74, 258-62. See Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [3.1].

¹⁷⁷ See, eg, see *Uniform Civil Procedure Rules Qld* (1999) rr 212(2), 429 which removes the privilege from expert reports and makes their disclosure a precondition of their admissibility at trial. Also see *Uniform Civil Procedure Rules 2005* (NSW) rr 31.21, 31.28.

¹⁷⁸ This privilege protects confidential communications between lawyers and clients made for the dominant purpose of seeking or providing legal advice and communications made between lawyers, clients and third parties for the dominant purpose of use in, or in relation to, existing or reasonably anticipated legal proceedings: *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49. For discussion of the two limbs of client legal privilege, see Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2007) [3.29]-[3.33]. The privilege is itself subject to exceptions, eg, it does not attach to communications 'relating to advice sought or given in furtherance of, or to facilitate, criminal, fraudulent or other unlawful purpose': Dal Pont, above n 25, 247-8.

¹⁷⁹ See, eg, clause 14 of the Mediation Agreement of the Australian Energy Regulator and Resolve Advisors Agreement set out in Hardy and Rundle, above n 6, appendix 2, 382-408. Also see clause 16 of the Agreement to Mediate contained in the Queensland Law Society Mediation Kit which provides that the mediator may make directions for the exchange of information.

agreed upon material (it would be rare for disclosure obligations to exceed those imposed by relevant procedural law). Lawyers must act honestly in carrying out their obligations ie they cannot knowingly mislead their opponent about material facts.

Some statutory schemes also require disclosure of specified information¹⁸⁰ and parties (and their lawyers) should endeavour to comply with the letter and spirit of the provisions. These provisions may require the scope of information exchange that takes place pursuant to the procedural rules for civil litigation discussed above.¹⁸¹ However, beyond observance of these basic measures, parties are not obliged to disclose information or to be honest and open with each other.¹⁸² They are not required to disclose privileged information. They are not required to reveal interests, BATNAs,¹⁸³ bottom lines and negotiation strategies.

2.5 Requirements in Relation to Good faith

2.5.1 The Rules of Professional Conduct

The professional conduct rules are silent on the issue of good faith.¹⁸⁴ The guidelines provided by some professional associations seek to impose on parties and their lawyers an ‘obligation’ to participate in mediation in good faith. For example, guideline 2.2 of the LCA *Guidelines for Lawyers in Mediations* provides that ‘[l]awyers and clients should act, at all

¹⁸⁰ See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 326 which provides that the mediator may ‘gather information about the nature and facts of the dispute in any way the mediator decides’.

¹⁸¹ Wolski, above n 15, 547, 634.

¹⁸² In my opinion, the *Civil Procedure Act 2010* (Vic) does not impose more stringent obligations on the parties and their representatives in civil proceedings conducted in Victoria. While the legislation imposes on participants an ‘overarching obligation’ to ‘act honestly at all times in relation to a civil proceeding’ and to refrain from engaging ‘in conduct which is misleading or deceiving’ or likely to be so (see ss 17, 21), the report of the Victorian Law Reform Commission which informed the legislation simply refers back to the obligations imposed on practitioners under relevant professional conduct rules and reiterates the requirements of section 52 of the TPA. It is also noteworthy that the commission proposed no enlargement of the basic duty to disclose documents (or any narrowing of the claim for privilege). See the Victorian Law Reform Commission (VLRC), *Civil Justice Review*, Report No 14 (March 2008) Chapter 3: ‘Improving the Standards of Conduct of Participants in Civil Litigation’ (*Civil Justice Review Report*) 182-9.

¹⁸³ This term is used by Fisher and Ury as an acronym for ‘Best Alternative to a Negotiated Agreement’: Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Business Books Limited, 2nd ed, 1991) 101.

¹⁸⁴ There is a kind of good faith obligation imposed on a legal practitioner in court in as much as he or she cannot, for instance, make allegations of fact under privilege unless the practitioner believes ‘on reasonable grounds that the factual material already available’ to the practitioner provides a proper basis to do so: see the rules in relation to responsible use of court process and privilege, LCA Model Rules rr 16.2-16.4; Barristers Rules rr 35-38.

times, in good faith to attempt to achieve settlement of the dispute'.¹⁸⁵ It further provides that '[a] lawyer should not continue to represent clients who act in bad faith or give instructions which are inconsistent with good faith'.¹⁸⁶ No definitions of the terms 'good faith' and 'bad faith' are provided. As discussed later, some common threads of what it means to act in good faith have been discerned from cases and commentaries concerning 'good faith' obligations in agreements to mediate and dispute resolution clauses but there remains great uncertainty about the meaning to be attributed to the term.

2.5.2 Other Components of the Law of Lawyering

There is some authority for the proposition that all parties who agree to mediate are subject, as a matter of contract law, to an implied obligation to participate in the mediation process in good faith.¹⁸⁷ Weston goes so far as to claim that 'parties to a private mediation who feel aggrieved by an opponent's lack of good faith possess a common law cause of action in contract and possibly tort'.¹⁸⁸ However, the law in this regard cannot be regarded as settled.¹⁸⁹

¹⁸⁵ LCA, *Guidelines for Lawyers in Mediation* (at March 2007) s 2.2.

¹⁸⁶ LCA, *Guidelines for Lawyers in Mediation* (at March 2007) s 2.2. Similar provision is made by the Law Society of New South Wales, *Professional Standards for Legal Representatives in a Mediation* (at 1 January 2008) s 5.4.

¹⁸⁷ See David Spencer, 'Requiring Good Faith Negotiation' (1998) 1 *ADR Bulletin* 37, 37 ('*Requiring Good Faith Negotiation*'); David Spencer, 'Drafting Good Faith Negotiation into Contracts' (2001) 4 *ADR Bulletin* 29, 30 ('*Drafting Good Faith Negotiation*'); Robert McDougall, 'The Implied Duty of Good Faith in Australian Contractual Law' Paper available at Supreme Court of New South Wales, http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court accessed 4/06/2010, 7. Also see the list of authorities given by NADRAC, *The Resolve to Resolve Report*, above n 7, 142, footnote 358. On the position in the US, see Maureen A Weston, 'Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality' (2001) 76 *Indiana Law Journal* 591, 596, 618-9. This obligation should be distinguished from the implied obligation to act in good faith in the performance and enforcement of the duties (and exercise of the rights) imposed on the parties to a contract, a doctrine often sourced to the judgment of Priestley JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 and canvassed by a number of Australian decisions since then (see William M Dixon, 'Common Law Obligations of Good Faith in Australian Commercial Contracts – A Relational Recipe' (2005) 33 *Australian Business Law Review* 87-98 accessed from <http://eprints.qut.edu.au> on 4/06/2010, 89, footnote 17).

¹⁸⁸ Weston, above n 187, 643-44; Roger L Carter, 'Oh, Ye of Little [Good] Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations' [2002] *Journal of Dispute Resolution* 367, 375-6.

¹⁸⁹ McDougall, above n 187, 8; Matthew Harper, 'The Implied Duty of "Good Faith" in Australian Contract Law' (2004) 11 *Murdoch University Electronic Journal of Law* available at http://www.murdoch.edu.au/elaw/issues/v11n3/harper113_13. Also see John Lande, 'Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs' (2002-2003) 50 *University of California Los Angeles Law Review* 69, 89.

2.5.3 Agreements and Legislative Directives to Mediate

Some dispute resolution clauses and agreements to mediate¹⁹⁰ seek to impose upon the parties an explicit obligation to participate in mediation in good faith. However, in Australia and elsewhere, judicial opinion on the meaning of ‘good faith’ and the issue of enforceability of contractual clauses containing ‘good faith’ provisions has been divided.¹⁹¹

The court in Australia has on some occasions struck down dispute resolution clauses containing good faith provisions on the ground that such provisions are too vague as to the conduct required of the parties and hence, too uncertain to be enforceable.¹⁹² Other judges have considered the clauses too vague because of a ‘necessary tension between negotiation, in which a party is free to, and may be expected to, have regard to self-interest rather than the interests of the other party, and the maintenance of good faith’.¹⁹³ However, the same court (the Supreme Court of New South Wales) constituted by a different judge later arrived at a different conclusion. Einstein J in *Aiton v Transfield*¹⁹⁴ was of the view that the words ‘good faith’ had meaning of sufficient certainty to be enforceable.¹⁹⁵ His Honour said that when a party agreed to negotiate in good faith, he or she was committing:

¹⁹⁰ In the case of private or non-institutional mediations, the parties may have entered into a contract containing a dispute resolution clause or mediation clause (whereby the parties agreed to refer any future disputes to mediation). In addition, the parties and a nominated mediator may have entered into an Agreement to Mediate (whereby the parties agreed to submit a particular dispute to mediation conducted by a nominated mediator). See eg clause 11 of the Agreement to Mediate contained in the Queensland Law Society’s Mediation Kit (the clause requires each party to ‘use its best endeavours to comply with reasonable requests made by the Mediator to promote the efficient and expeditious resolution of the’ dispute).

¹⁹¹ Wolski, above n 15, 539-41. For this reason, Spencer recommends against inclusion of a ‘good faith’ participation requirement in dispute resolution clauses: see Spencer and Brogan, above n 1, 419. It is better to stipulate exactly what is expected of the parties in objective and concrete terms.

¹⁹² Wolski, above n 15, 540. See, eg, Handley JA in a dissenting judgment in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1, 41-2.

¹⁹³ *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709, 716 (Giles J). This appears to be the view adopted by the House of Lords in England, see *Walford v Miles* [1992] 1 All ER 453, 460. Also see Spencer’s discussion of relevant cases: Spencer, *Requiring Good Faith Negotiation*, above n 187, 37-8, 40.

¹⁹⁴ [1999] NSWSC 996 (1 October 1999). Also see *State Bank v Freeman; Freeman v NSW Rural Assistance Authority* (Unreported, Supreme Court of NSW, Badgery-Parker J, 31 January 1996) 35 where his Honour said that ‘it does not appear to me that an inference of lack of good faith can be drawn from the adoption of a strong position at the outset and a reluctance to move very far in the direction of compromise without more’.

¹⁹⁵ [1999] NSWSC 996 (1 October 1999). The Court ultimately held that the mediation clause in that case was void for uncertainty as it did not apportion the mediator’s costs between the parties and, since the mediation clause was not severable from the negotiation clause, both clauses fell. See the discussion of relevant cases by Einstein J in *Aiton v Transfield* [1999] NSWSC 996 (1 October 1999) [87]-[98]. His Honour concedes that the law in this area has not settled, see [100].

- 1) to undertake to subject oneself to the process of negotiation or mediation (which must be sufficiently precisely defined by the agreement to be certain and hence enforceable).
- 2) to undertake in subjecting oneself to that process, to have an open mind in the sense of:
 - a) a willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator, as appropriate.
 - b) a willingness to give consideration to putting forward options for the resolution of the dispute.

Subject only to these undertakings, the obligations of a party who contracts to negotiate or mediate in good faith, do not oblige nor require the party:

- a) to act for or on behalf of or in the interests of the other party;
- b) to act otherwise than by having regard to self-interest.¹⁹⁶

More recently, the New South Wales Court of Appeal expressed the view that ‘[w]hat the phrase “good faith” signifies in any particular context and contract will depend on that context and that contract.’¹⁹⁷ Still, other commentators point to common threads of what it means to act in good faith: they include attendance at the mediation, some preparation, having someone in attendance with authority to settle, acting cooperatively and unwillingness to mislead.¹⁹⁸

Some judges and commentators define good faith not by what it constitutes but by what it is not ie by identifying bad faith.¹⁹⁹ Bad faith behaviour is said to include: failing to attend to pre-mediation activities including failing to submit necessary documents, failing to attend the mediation, repeatedly cancelling or delaying the mediation, coming to the mediation without authority to settle, failing to bring experts as ordered, failing to explain positions or to listen or respond to the other party, withholding information or repeatedly refusing reasonable

¹⁹⁶ [1999] NSWSC 996 (1 October 1999) [156] (Einstein J). Also see Wolski, above n 15, 540.

¹⁹⁷ *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177 (3 July 2009) [70] (Allsop P with whom Ipp JA and Macfarlan JA agreed). The court was dealing with ‘a clearly worded dispute resolution clause’ in an engineering contract [70]. NADRAC also concludes that ‘assessing whether good faith or genuine effort have been exhibited depends, at least in part, on the context’: *The Resolve to Resolve Report*, above n 7, 145.

¹⁹⁸ Weston, above n 187, 628; Spencer, *Drafting Good Faith Negotiation*, above n 187, 33.

¹⁹⁹ See Ulrich Boettger, ‘Efficiency Versus Party Empowerment – Against A Good-Faith Requirement In Mandatory Mediation’ (2004) 23 *Review of Litigation* 1, 17; McDougall, above n 187, 4; Harper, above n 189, [4]. Also see Hilary Astor, ‘Making a ‘Genuine Effort’ in Family Dispute Resolution: What Does it Mean?’ (2008) 22 *Australian Journal of Family Law* 102.

requests for information, unilaterally withdrawing from the mediation, failing to sign a mediated agreement²⁰⁰ and engaging in unspecified bad-faith behaviour.²⁰¹

But, as discussed further in part 4 of this exegesis, despite these attempts to define good faith (or its absence), most commentators agree that there is no uniformly recognized and clear definition of the duty of good faith.²⁰² They also agree that the cases, both in Australia and in the US, are difficult to reconcile.²⁰³

It is not uncommon for legislation which makes provision for referral of cases to mediation to seek to impose on the parties an obligation to participate in ‘good faith’ or to act ‘genuinely’ in the mediation.²⁰⁴ Unfortunately, the legislation tends not to define what it means by these terms²⁰⁵ and judicial comment on the concept, while helpful, is not definitive.²⁰⁶

There does appear to be wide agreement that some behaviour is not inconsistent with good faith. Good faith does not preclude use of positional negotiation or use of advocacy. Good faith does not require parties to make any or any particular settlement offers.²⁰⁷ Carter opines that ‘[i]f a party does not have an absolute right to offer as little as it chooses during

²⁰⁰ Weston, above n 187, 605, 630; Boettger, above n 199, 17. Also see Lande who analyses 27 reported cases dealing with bad faith in mediation (all arise in court-connected programs) and groups behaviours alleged to constitute bad faith into 5 separate categories: Lande, above n 189, 82-3.

²⁰¹ Lande, above n 189, 82-3.

²⁰² Anne M Burr, ‘Ethics in Negotiation: Does Getting To Yes Require Candor?’ (2001) (May/July) *Dispute Resolution Journal* 10, 12; Weston, above n 187, 626.

²⁰³ Carter, above n 188, 383-6; Spencer, *Requiring Good Faith Negotiation*, above n 187, 37-8, 40.

²⁰⁴ See, eg, s 27 of the *Civil Procedure Act 2005* (NSW) which requires that parties referred to mediation participate in good faith. The term ‘good faith’ is not defined. Also see r 325 of the *Uniform Civil Procedure Rules 1999* (Qld) which states that: ‘[t]he parties must act reasonably and genuinely in the mediation and help the mediator to start and finish the mediation within the time estimated or set in the referring order’. The Queensland rules do not define the terms ‘reasonably’ and ‘genuinely’. Some legislation also imposes an obligation on the parties to ‘make a genuine effort to resolve’ a dispute before commencing court proceedings: see, eg, *Family Law Act 1975* (Cth) s 60I(1) and s 10F. See generally the pre-litigation requirements discussed in part 3. The legislation does not define the concept of ‘genuine’ effort. See NADRAC’s *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, Appendix 2.1, 117 for a list of federal legislation prescribing conduct obligations in ADR.

²⁰⁵ The position appears to be similar in the US with several authors noting that none of the statutes or court rules containing requirements of good faith in mediation provide a clear definition of what it means. See Boettger, above n 199, 17; Carter, above n 188, 372. Lande finds one exception, a statute which applies to farmer-lender disputes: Lande, above n 189, 80.

²⁰⁶ The most well known judicial interpretation of good faith in Australia can be found in the case of *Western Australia v Taylor (Njama People)* (1996) 134 FLR 211 heard by the National Native Title Tribunal. Member Sumner set out a list of 18 indicia which defined good faith negotiation under the *Native Title Act 1993* (Cth) discussed by Spencer: Spencer, *Requiring Good Faith Negotiation*, above n 187, 43.

²⁰⁷ Carter, above n 188, 384, 395.

mediation, then an important element of party autonomy will be lost'.²⁰⁸ Good faith does not preclude a party from refusing to accept a settlement offer²⁰⁹ or from failing to give reasons for refusing an offer.²¹⁰ Good faith does not require the parties to reach an agreement²¹¹ or even to possess a sincere desire to settle.²¹² Nor need the parties engage in total disclosure.²¹³ Good faith does not preclude the parties from having regard to self-interest.²¹⁴ As Spencer asserts, 'it is not a course of conduct which requires the forfeiture of a person's self-interest'.²¹⁵ A person may try to get the best outcome for him or herself and 'let self-interest dictate the acceptance or rejection of a settlement offer at mediation, perfectly consistent with having acted in good faith'.²¹⁶

2.6 Requirements in Relation to Cooperation

2.6.1 The Rules of Professional Conduct

Although some non-binding guidelines issued by lawyers' professional associations provide that legal representatives should cooperate with mediators,²¹⁷ the professional conduct rules do not require cooperation with mediators or between opponents in mediation. As Peppet summed up in relation to negotiation, there is no professional requirement 'to cooperate rather than compete'.²¹⁸

²⁰⁸ Ibid 384.

²⁰⁹ Weston, above n 187, 626-7; Boettger, above n 199, 18.

²¹⁰ Boettger, above n 199, 18.

²¹¹ Charles J McPheeters, 'Leading Horses to Water: May Courts Which Have the Power to Order Attendance at Mediation Also Require Good-Faith Negotiation?' [1992] *Journal of Dispute Resolution* 377, 385, 391; Burr, above n 202, 13; Boettger, above n 199, 18.

²¹² Boettger, above n 199, 18.

²¹³ Burr, above n 202, 13.

²¹⁴ See Spencer and authorities cited therein: Spencer, *Requiring Good Faith Negotiation*, above n 187, 44. As the court noted in *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177 (3 July 2009) [76] (Allsop P): 'the obligation to undertake genuine and good faith negotiations does not require any step to advance the interests of the other party'.

²¹⁵ Spencer, *Requiring Good Faith Negotiation*, above n 187, 44.

²¹⁶ Spencer and Brogan, above n 1, 423. Generally see David Spencer and Tom Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co., 2005) 306-11 and Boulle, above n 39, 627-32.

²¹⁷ See the Law Society of New South Wales, *Professional Standards for Legal Representatives in a Mediation* (at 1 January 2008) s 5.1 which provides that '[a] legal representative should: cooperate with the mediator'. No definition of cooperation is provided.

²¹⁸ Peppet, above n 13, 72. Also see Lamb and Littrich who confirm that 'there is no duty to assist one's opponent': Lamb and Littrich, above n 74, 298.

2.6.2 Other Components of the Law of Lawyering

Some of the case law and commentary concerning an obligation of good faith suggests that cooperation might be a required element.²¹⁹ If a party is required to attend the mediation with an open mind and to consider offers and proposals for settlement, as Einstein J suggested in *Aiton v Transfield*,²²⁰ then he or she must cooperate to this limited extent. But cooperation in the context of negotiation and mediation could be taken to include all of the characteristics that negotiation theorists such as Lewicki, Barry and Saunders attribute to cooperative negotiators such as trust and openness, and a willingness to convey one's own needs and to respond to those of the other parties.²²¹ It is suggested that this concept (or set of concepts) is too broad and vague. There is no requirement in general contract law (nor in torts, equity or adjectival law), absent a specific provision, to cooperate with one's counterpart in this full sense of the term.²²²

2.6.3 Agreements and Legislative Directives to Mediate

Some agreements to mediate require the parties to cooperate with the mediator and with each other.²²³ It is usual for the parties to agree to comply with 'reasonable' mediator requests such as requests to provide to the mediator and to each other lists of disputed issues and copies of relevant documents. But parties are not required to cooperate beyond observance of these minimum steps.

²¹⁹ Weston, above n 187, 628; Spencer, *Drafting Good Faith Negotiation*, above n 187, 33. This suggestion is also found in cases and commentary on an implied obligation of good faith in contractual performance and enforcement, see, eg, Sir Anthony Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66 discussed in McDougall, above n 187, 5. McDougall agreed that 'co-operation is an incident of the duty of good faith': above n 187, 5. Also see Harper who asserts that concepts or values such as cooperation, reasonableness, proper purpose and legitimate interest are often linked to the implied duty of good faith: Harper, above n 189, [3].

²²⁰ [1999] NSWSC 996 (1 October 1999).

²²¹ Lewicki, Barry and Saunders, above n 20, 115.

²²² Peppet, above n 13, 72.

²²³ See, eg, clause 9 of the Agreement to Mediate, contained in the Law Society of New South Wales' Mediation and Evaluation Information Kit, updated 1 January 2008; clauses 10 and 11 of the Agreement to Mediate contained in the Queensland Law Society's Mediation Kit. Also see Hardy and Rundle, above n 6, sample agreements to mediate, appendix 2, 382-408.

Some statutory mandates to mediate also impose obligations in relation to cooperation.²²⁴ For example, rule 325 of the *Uniform Civil Procedure Rules 1999* (Qld) requires the parties ‘to act reasonably ... and help the mediator to start and finish the mediation within the time estimated or set in the referring order’. However, the rules do not elaborate on what is required by way of ‘help’.²²⁵

The *Civil Procedure Act 2010* (Vic) provides that ‘a person to whom the overarching obligations apply must cooperate with the parties to a civil proceeding and the court in connection with the conduct of that proceedings’.²²⁶ The term ‘cooperate’ is not defined in the legislation and the VLRC, whose *Civil Justice Review Report* led to the passage of the legislation, did not elaborate on what ‘cooperation’ involved. Interestingly, the VLRC originally proposed that there should be an obligation to act in good faith. Following public consultation, the commission ‘conceded that it had a concern about the vagueness of [a good faith] obligation’²²⁷ and resolved to replace the obligation to act in good faith with an obligation to ‘cooperate’.²²⁸ In commenting on this legislative development, NADRAC notes that ‘the duty to “cooperate” may be subject to some of the same difficulties of definition as the duty to participate in good faith or to make a genuine effort.’²²⁹

2.7 Requirements in Relation to Fairness

2.7.1 The Rules of Professional Conduct

Fairness is a concept which can be applied both to the process and outcome of mediation. It overlaps with the concepts already discussed above. One may be unfair procedurally and at the same time, bring about an unfair outcome by eg not disclosing vital information. The obligation to disclose information is governed by the ‘rules of disclosure’ discussed above and will not be discussed again here.

²²⁴ See, eg, *Motor Accident Insurance Act 1994* (Qld) s 45.

²²⁵ See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 325.

²²⁶ *Civil Procedure Act 2010* (Vic) s 20.

²²⁷ VLRC, *Civil Justice Review Report*, above n 7, 183.

²²⁸ Ibid.

²²⁹ NADRAC, *The Resolve to Resolve Report*, above n 7, 148.

A legal representative may also act unfairly in the mediation process by being uncivil or discourteous, by making threats, by attempting to cross-examine or interrogate the other party and by not allowing him or her to speak freely.²³⁰ There is a general duty of fairness owed by lawyers to those with whom they deal. As mentioned previously, there are statements of general principle in the existing LCA Model Rules which require practitioners to act with honesty, fairness and courtesy in their dealings with other persons.²³¹ These statements of general principle are not followed up by specific rules dealing with fairness (and no definition of fairness or other associated terms is offered in the rules). It is argued in part 4 of this exegesis that this general approach is appropriate in mediation for mediators are responsible for ensuring process fairness and arguably, what is fair will vary with the circumstances of each mediation. It is also consistent with the court's approach, with terms such as civility and courtesy taking their meaning from the context in which specific behaviour occurs.²³²

There is no obligation on legal representatives to ensure a fair outcome for their own clients in mediation although they must ensure that their clients understand their legal rights and obligations and the significance and consequences of any agreement reached.²³³ Legal representatives have no specific obligation to ensure that the outcome is fair to other parties to the mediation (or other affected third parties) except where special obligations are imposed by legislation as is the case in family law matters.²³⁴ That said, lawyers must keep in mind their duty to the administration of justice. They are subject to a general duty to refrain from conduct which is discreditable to a practitioner, prejudicial to the administration of justice or

²³⁰ White notes that the concept of fairness 'speaks to a variety of acts in addition to truthfulness and also different from it': James J White, 'Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation' (1980) *American Bar Foundation Research Journal* 926, 928. It has something to say about the threats a negotiator may use, about the favours he may offer, and extraneous factors that may be used in negotiation: White, 928. Also see Hazard, above n 138, 182.

²³¹ LCA Model Rules, statements of general principle for 'relations with other practitioners' and 'relations with third parties'. Also see Dal Pont who claims that '[i]n their dealings with other members of the profession, and with persons other than clients, lawyers' conduct must be characterised with the same principles of good faith, honesty and fairness required in their relations with clients and the court': Dal Pont, above n 25, 469.

²³² See *Lander v Council of the Law Society of the Australian Capital Territory* [2009] ACTSC 117 (11th September 2009) (Higgins CJ, Gray and Refshauge JJ) discussed n 121. In commenting on this decision, Hardy and Rundle note that 'standards of courtesy vary according to culture, context and values': Hardy and Rundle, above n 6, 228. Also see *Legal Practitioners Complaints Committee and Fleming* [2006] WASAT 352 (7 December 2006) [73].

²³³ LCA Model Rules r 12.2; Barristers' Rules r 17.

²³⁴ See for instance Family Law legislation which seems in all jurisdictions to make the interests of the children paramount.

which might otherwise bring the legal profession into disrepute.²³⁵ This duty is recognised under the professional conduct rules and at common law.

2.7.2 Other Components of the Law of Lawyering

Occasionally cases have arisen where the court has held that a lawyer's actions in securing an agreement and in failing to disclose information to an opponent were so unfair that the agreement in question should be set aside. The grounds relied on by the court in setting aside these agreements have varied – ranging from breach of principles of contract law,²³⁶ to breach of the practitioner's common law obligations to the administration of justice and to the court.²³⁷ Some of the most interesting and well known cases have occurred in the US. In *Virzi v Grand Trunk Warehouse and Cold Storage Co*²³⁸ the plaintiff's lawyer failed to advise the defendant that the plaintiff in a personal injuries action had died from unrelated factors prior to completion of settlement discussions. The defendant entered into a settlement agreement in ignorance of this fact. The court held that the plaintiff's legal representative was under a duty to disclose the death of his client to opposing counsel prior to negotiating the final settlement agreement. The case analysis was based on principles of contract law (the executor of the plaintiff's estate should have been substituted for the deceased plaintiff as party to the agreement) rather than principles of ethics.

In *Spaulding v Zimmerman*,²³⁹ another personal injuries case, the plaintiff's own doctors concluded that the plaintiff's injuries had healed completely. However, the doctor who examined the plaintiff on behalf of the defendant discovered a life-threatening aneurysm on the plaintiff's aorta which had been caused by the accident. The plaintiff's lawyer never asked about the results of the examination conducted by the defendant's doctor and the defendant's lawyer did not volunteer the information. The Supreme Court of Minnesota determined that the defendant's lawyer was under no legal ethical duty to volunteer the new

²³⁵ See Part (A) of the general principles of professional conduct section of the Professional Conduct and Practice Rules 2005 of the Law Institute of Victoria Limited; the objects clause of the Queensland *Legal Profession (Solicitors) Rule 2007*.

²³⁶ See, eg, *Virzi v Grand Trunk Warehouse and Cold Storage Co*, 571 F Supp 507, 512 (ED Mich 1983) discussed in Charles B Craver, 'Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to be Assertive Without Being Offensive' (1997) 38 *South Texas Law Review* 713, 721; Barry R Temkin, 'Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?' (2004-2005) 18 *Georgetown Journal of Legal Ethics* 179, 202.

²³⁷ *Spaulding v Zimmerman* 116 NW 2d 704 (Minn 1962) discussed in Craver, above n 236, 722.

²³⁸ 571 F Supp 507, 512 (ED Mich 1983).

²³⁹ 116 N.W.2d 704 (Minn. 1962).

medical information to the plaintiff's lawyer. Craver argues that, as a matter of strict legal ethics, this decision is correct.²⁴⁰ However, the court held that, as an officer of the court, defence counsel had an affirmative duty to disclose the existence of the plaintiff's medical condition to the court prior to its approval of the settlement agreement.²⁴¹

In light of these cases (from which it is difficult to derive general principles), Temkin argues that:²⁴²

1. In cases like *Spaulding v Zimmerman*, where one party withholds from the other, knowledge about the existence in the other of a life-threatening medical condition, the court might hold that 'a general duty of fairness ... trumps the adversary system of justice in general and the attorney's duty of zealous advocacy to clients in particular'.²⁴³
2. There may be circumstances in which 'the duty to not bring the legal profession into disrepute and fairness to an opponent may require that the practitioner draw attention to a particular matter, even where the opponent's misapprehension is not induced by that practitioner'.²⁴⁴

2.7.3 Agreements and Legislative Directives to Mediate

I have been unable to find any agreements to mediate or legislative directives to mediate which require the parties or their lawyers to act fairly to the other party in mediation or to ensure a fair mediated outcome.²⁴⁵

²⁴⁰ *Spaulding v Zimmerman* 116 NW 2d 704 (Minn 1962) discussed in Craver, above n 236, 722.

²⁴¹ The result may have been different had the court not been required to approve the settlement (court approval was required because the plaintiff was a minor).

²⁴² Wolski, above n 15, 634.

²⁴³ Temkin, above n 236, 202.

²⁴⁴ Ibid 181.

²⁴⁵ See agreements set out in Hardy and Rundle, above n 6, appendix 2, 382-408. Also see agreements to mediate contained in the mediation kits provided by the Queensland Law Society and the Law Society of New South Wales. Other agreements perused include the Agreement to Mediate provided by the NSW Rural Assistance Authority for use under the *Farm Debt Mediation Act 1994* (NSW); Agreement to Mediate, U.S. District Court of Oregon (Revised 18 February 2011); Sample Agreement to Mediate, United States Arbitration & Mediation, available at http://www.usam.com/services/med_agreement.shtml; Sample Agreement to Mediate, Dispute Resolution Office, Ministry of Attorney General for British Columbia, Canada available at <http://www.ag.gov.bc.ca/dro/mediation-in-bc/sample-agreement.htm>.

2.8 Resolution of Conflicting Duties

In any lawyer-client representational context, there is potential for conflict to arise between the various duties owed by lawyers. Some guidance on the issue of priority to be given to particular duties is given, if not in the rules, then in the general law.

2.8.1 The Rules of Professional Conduct

When a conflict occurs, a lawyer's paramount duty is to the court and the administration of justice. Currently, the professional conduct rules do not contain explicit statements to this effect.²⁴⁶ References to 'the duty to the administration of justice' only appear in object sections and preambles.²⁴⁷ Nonetheless, any doubt in this matter is resolved by the general law. That is not to say that it is always easy to discern 'at what point the duty to the court overrides the duty to the client'.²⁴⁸

Duties owed to clients will normally take precedence over those owed to third parties²⁴⁹ except where action (or inaction) taken on the client's behalf also impinges on duties owed to the administration of justice. Once again, there are no explicit statements to this effect in the rules.²⁵⁰ In fact, different lawyers may do (or refrain from doing) different things when confronted with conflicting duties depending on which of a number of different approaches to ethical reasoning they adopt.²⁵¹

²⁴⁶ There is no separate category of rules, either in the Solicitors' Rules or the Barristers' Rules dealing with duties to the administration of justice.

²⁴⁷ See the object section, Victorian and Queensland Solicitors' Rules and the preamble of the Barristers' Rules rr 1 and 3. The preamble to the Barristers' Rules provides that '[t]he administration of justice is best served by reserving the practice of law to those who owe their paramount duty to the administration of justice': preamble, clause 1 (r 10 provides that the rules 'should be read and applied so as most effectively to attain the objects and uphold the values expressed in their Preamble'.) Also see the preamble of the ABA Model Rules, [1], [6].

²⁴⁸ Parker and Evans, above n 17, 169.

²⁴⁹ No special duties arise in the case of unrepresented parties although Dal Pont cautions that practitioners should take 'care' to 'avoid any allegation of undue pressure': Dal Pont, above n 25, 496. See the discussion by Dal Pont who observes that 'to take account of the opponent or other party's interests could be detrimental to the client's interests, and thus a breach of duty': Dal Pont, above n 25, 496.

²⁵⁰ The rules contain strong unequivocal statements of obligation to 'advance and protect the client's interests to the best of the [practitioner's] skill and diligence'. See, eg, ABA Model Rules r 16; LCA Model Rules rr 1.1, 12.1-12.4.

²⁵¹ Parker and Evans suggest that it is only the 'responsible lawyer' who sees loyalty to the client to be 'confined and constrained by the lawyer's loyalty to the court and the legal system': Parker and Evans, above n 17, 168. They compare the responsible lawyer's perspective with that of the zealous adversarial advocate who shows 'unadulterated loyalty to client': 167. According to Parker and Evans, lawyers motivated by an ethic of care might give more emphasis to the duties owed to third parties, see Parker and Evans, above n 17, 170-2, while those who favour a moral activist approach might be motivated by the public interest: 169.

The rules provide only limited guidance as to the actual circumstances in which a lawyer's duties may conflict.²⁵² For the purpose of this analysis, I consider two possible situations of conflict below.

A conflict between duties owed to the administration of justice, duties owed to third parties, and duties owed to clients might arise in mediation:²⁵³

1. When a client wants his or her lawyer to use mediation for an 'improper purpose' such as to delay commencement of legal proceedings or to fish for information.²⁵⁴
2. When a client instructs his or her lawyer to withhold confidential information from an opponent and/or from the mediator.²⁵⁵

Each of these situations ultimately involves the question of client authority versus lawyer independence. There is some guidance available on this issue in the rules (and the general law).

Conventional wisdom is that lawyers should *abide* by their client's decisions in respect of objectives to be achieved from a representation providing those objectives are lawful (it is beyond contention that a lawyer must comply with a client's instructions to grant or not to grant a particular concession, and abide by the client's decision as to whether or not to make or accept a particular offer of settlement)²⁵⁶ and *consult* with their client in respect of the means used to achieve objectives where means includes styles, approaches and tactics to be

²⁵² ALRC 89, above n 10, [3.85].

²⁵³ This is not intended to be an exhaustive statement of the circumstances in which a conflict might arise.

²⁵⁴ I recognise that whether or not these circumstances constitute an improper purpose is itself a threshold question of ethical judgment.

²⁵⁵ A legal representative owes a duty of confidence, not just to his or her client, but also to the other participants in the mediation process. There are at least three (and possibly four) legal foundations for the claim of confidentiality: the common law 'without prejudice' privilege; the terms of the Agreement to Mediate (or a separate Confidentiality Agreement) if there is one; and statutory provisions where mediation takes place pursuant to legislative provision (see, eg, *Supreme Court of Queensland Act 1991* (Qld) s 112 and *Civil Procedure Act 2005* (NSW) s 31) and some professional practice guidelines (see, eg, LCA, *Guidelines for Lawyers in Mediations* (at March 2007) s 2.1). However, information and admissions revealed at mediation are not shielded from disclosure if they can be proven via other means: *AWA Ltd v Daniels (t/as Deloitte Haskins & Sells)* (1992) 7 ASCR 463. This proposition was adopted by the court in *Williamson v Schmidt* [1998] 2 Qd R 317. See the discussion of these cases by Colbran et al, above n 77, 86-91.

²⁵⁶ Lewis, Kyrou and Dinelli, above n 176, 151; Condlin, above n 105, 72. See Boulle's discussion of the 'Studer saga' (in which three courts commented on a lawyer's conduct in the same mediation) which emphasise that it is the client's decision to compromise or not in mediation: Boulle, above n 39, 299-301.

used in the mediation.²⁵⁷ This convention has been formalised into a rule in the ABA Model Rules²⁵⁸ and in both sets of professional conduct rules in Australia.²⁵⁹ In Australia, the relevant provision only appears in the context of the rules dealing with litigation and advocacy.²⁶⁰ However, as was observed in the discussion of *Mullins*' case, the court is prepared to apply the principles contained in these rules to other contexts. Indeed, in the case of *Legal Practitioners Complaints Committee and Fleming*²⁶¹ the Tribunal found that:

both in respect of litigation and in providing legal advice and assistance generally, a practitioner is not a mere agent and mouthpiece for his client, but a professional exercising independent judgment (exclusively in many forensic areas) and providing independent advice ... [t]he lesson from a case such as this, is that where the client's instructions may run counter to normal ethical principles and a practitioner's own personal standards, he or she should think seriously before proceeding in accordance with those instructions.²⁶²

Consequently, lawyers need not do everything asked of them by clients. They may make tactical and technical decisions about how best to advance a client's objectives and they may choose their own preferred negotiation style.²⁶³

The first situation posited above ie using mediation for an improper purpose, appears to concern an objective of mediation and on the face of it, a lawyer would be bound to follow the client's instructions. However, a lawyer is entitled to, and should, refuse to act if a client asks him or her to take part in some illegal activity or to take some action which would

²⁵⁷ Categorisation of instructions into means or objectives is not always easy. For instance, Burns argues that instructions to negotiate in a cooperative manner could be either a choice of means or a choice of the goals of the representation: Burns, above n 2, 699.

²⁵⁸ See r 1.2(a) of the ABA Model Rules which provides that, with some limitations, a lawyer shall abide by a client's decision concerning the objectives of the representation and consult with the client as to the means by which the objectives are to be pursued. Cf Gifford, who asserts that the choice of negotiation strategy 'is a decision to be made jointly by the attorney and the client': Donald G Gifford, 'A Context-Based Theory of Strategy Selection in Legal Negotiation' (1985) 46 *Ohio State Law Journal* 40, 59, 66.

²⁵⁹ See r 18 of the Barristers' Rules (and for solicitor advocates, r 13.1 of the LCA Model Rules; r 17.1 of the draft Solicitors Rules 2010) which requires barristers to exercise forensic judgments called for during a case independently of the wishes of the client and instructing solicitor and prohibits a barrister from acting as 'the mere mouthpiece of the client'.

²⁶⁰ But see Preamble, clause 5 which is stated in more general terms. It provides that barristers 'should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients'.

²⁶¹ [2006] WASAT 352 (7 December 2006).

²⁶² [2006] WASAT 352 (7 December 2006) [70]-[71]. In the cases of *Mullins* (and *Garrett*) and *Fleming*, the practitioners followed the instructions of their clients although, in the case of *Mullins* at least, it was done with some reluctance on the part of the practitioner concerned. For discussion of the facts in the case of *Fleming*, see above n 143.

²⁶³ As Condlin notes, lawyers owe clients only substantive competitiveness: Condlin, above n 105, 76-7.

amount to a breach of the lawyer's overriding duty to the court and the administration of justice. A lawyer who wanted to decline the brief in this situation (or to cease to act if the brief had already been accepted) might argue that it was a breach of his or her duty to the administration of justice to act or to continue to act for a client who wished to use mediation for an improper purpose (it is difficult to conceive of this as an illegal activity). Of course, many clients will not 'own up' that this is their objective and indeed it may not be their sole objective.²⁶⁴

The decision to withhold (or to disclose) confidential information does not usually fall within either category of means or objectives because it is the subject of specific provision: as a general rule, a lawyer must follow a client's instruction to withhold information.²⁶⁵ But it is impossible to suggest an appropriate course of action for a lawyer who finds himself or herself in this situation without knowing the specifics of the information which the client wants to withhold. There will be no problem withholding information about bottom lines and willingness to settle. But the cases discussed above are sufficient to illustrate that in some circumstances, failure to disclose information (such as information about the existence of a life-threatening medical condition) will constitute a breach of a lawyer's paramount duty to the administration of justice. This is not to say that the practitioner should actually disclose the information for he or she is still bound by the duty of confidentiality and loyalty owed to the client. The practitioner's first course of action should be to seek to obtain the client's instructions to reveal the information. If the practitioner considers the information in question to be material and the client does not agree to disclose it, it is submitted that the lawyer has 'good cause' for refusing to continue to act for the client (providing always that a lawyer can only cease to act on the giving of reasonable notice to the client of this intention).²⁶⁶ This course of action is supported by the guidelines of the LCA mentioned previously.

2.8.2 Other Components of the Law of Lawyering

It has long been recognised at general law that a legal practitioner is an officer of the court. This status is now given a statutory foundation.²⁶⁷ The courts have repeatedly held that, as officers of the court, practitioners owe an 'overriding' or 'paramount' duty to the court

²⁶⁴ Some lawyers might suggest this course of action.

²⁶⁵ Condlin, above n 105, 74.

²⁶⁶ LCA Model Rules r 6.1.3; Barristers' Rules r 97.

²⁶⁷ See, eg, *Legal Profession Act 2004* (NSW) s 33; *Legal Profession Act 2007* (Qld) s 38.

rather than to the client.²⁶⁸ The independence of lawyers has also long been recognised at general law. Dal Pont asserts that '[t]he proper administration of justice depends, and the court relies, on the faithful exercise by lawyers of an independent judgment in the conduct and management of the case'.²⁶⁹

But, as is the case with the professional conduct rules, there is little specific guidance offered in the general law as to the circumstances in which a conflict exists between the various duties owed by lawyers.

2.8.3 Agreements and Legislative Directives to Mediate

It is unusual for agreements to mediate and legislative directives to mediate to impose a specific obligation on participants in mediation to further the administration of justice. However the *Civil Procedure Act 2010* (Vic) now provides that lawyers and parties have a paramount duty to the court to further the administration of justice in relation to any civil proceedings in which that person is involved including any 'appropriate dispute resolution' undertaken in relation to that proceedings.²⁷⁰ It is unlikely that this provision would augment the general law or the duties imposed on lawyers by the professional conduct rules. It appears to have been introduced as a way to ensure that unrepresented litigants, who do not owe a direct duty to the court and are not subject to the same influences and constraints as lawyers, comply with the new objectives of the civil litigation system (discussed in part 3).²⁷¹

2.9 Other Constraints on Lawyers' Behaviour

In addition to those constraints found in the current rule systems governing lawyers and in the general law, certain other constraints may operate on lawyers in negotiation and

²⁶⁸ On the primacy of the duty to the court, see *Giannarelli v Wraith* (1988) HCA 52, [12]; *Rondel v Worsley* [1969] 1 AC 191, 227. For a discussion of the position in Australia, see Corones, Stobbs and Thomas, above n 77, 88; Dal Pont, above n 25, 373. Also see *Hopeshore Pty Limited v Melroad Equipment Pty Limited* [2004] FCA 1445 (9 November 2004) in which the court held that a legal representative had acted inconsistently with his duty to assist the Court in the management of proceedings involving his client by failing to proceed with mediation as ordered by the court [34]. In fact, the referral to mediation was made by consent at a directions hearing. The court concluded that the practitioner had taken the view that early mediation was not in his client's best interests and had acted in a way calculated to defer the mediation: [34]-[35]. The court took the conduct of the legal practitioner into account in determining whether or not to exercise discretion in favour of that practitioner's client in an application for security for payment of costs (the court dismissed the motion) [39].

²⁶⁹ See Dal Pont, above n 25, 375 and cases cited therein.

²⁷⁰ *Civil Procedure Act 2010* (Vic) s 16.

²⁷¹ VLRC, *Civil Justice Review Report*, above n 7, 165-6.

mediation. One such constraint derives from the fear of developing a bad reputation (coupled with the sanction of peer criticism).²⁷² It is considered by some authors to be a potent deterrent to trust abuse.²⁷³ The reputation effect has impact at two levels: in repeat dealings (negotiators who believe that their trust has been abused will be reluctant to trust an offending negotiator again) and in the general marketplace (future opponents will look warily at a negotiator who has a reputation for being dishonest).²⁷⁴ However, the power of reputation should not be overstated. The reputation effect is more profound in a small community than a large heterogeneous one,²⁷⁵ a factor which operates to make collaborative law groups effective. In order for this constraint to be effective, lawyers must operate in an environment in which they can establish a reputation for trustworthiness ‘that is powerful enough to register with prospective clients and other lawyers and is therefore valuable enough to protect’.²⁷⁶ Many lawyers do not practise in this type of setting.

2.10 Summary and Review

At the beginning of this part of the exegesis, I posed five ethical questions which legal representatives might expect to have to answer while representing clients in mediation.

As to the question of what is the appropriate level of honesty and openness required in mediation, there is some lack of clarity in Australia. While the professional conduct rules currently define ‘court’ to include ‘mediations’, it is not clear whether the ‘court standard’ of disclosure or the standard that is normally owed to opponents, is meant to apply to mediators. For reasons given earlier, I think that the reference to ‘mediations’ in the definition section of the rules was intended to mean ‘mediators’ and that legal practitioners in Australia owe to mediators the same duties as they owe to judges. If this is the case, then legal representatives in Australia cannot knowingly make misleading statements about matters of law or fact²⁷⁷ to mediators and they may even be prohibited from expressing certain opinions to mediators.

²⁷² Nancy J Moore, ‘Lawyer Ethics Code Drafting in the Twenty-First Century’ (2002) 30 *Hofstra Law Review* 923, 924.

²⁷³ Burr, above n 202, 14; Paul Rosenberger, ‘Laissez-“Fair”: An Argument for the Status Quo Ethical Constraints on Lawyers as Negotiators’ (1997-1998) 13 *Ohio State Journal on Dispute Resolution* 611, 629-30; Norton, above n 161, 501.

²⁷⁴ Burr, above n 202, 14; Rosenberger, above n 273, 630-33; Norton, above n 161, 526.

²⁷⁵ White, above n 230, 930.

²⁷⁶ Ted Schneyer, ‘The Organized Bar and the Collaborative Law Movement: A Study in Professional Change’ (2008) 50 *Arizona Law Review* 289, 329.

²⁷⁷ LCA Model Rules r 14.1; Barristers’ Rules r 21; draft Solicitors’ Rules 2010 r 19.1; draft Barristers’ Rules 2010 r 26.

They must inform mediators of any relevant binding authorities and legislative provisions of which they are aware.²⁷⁸ Currently, the rules offer no guidance on whether the disclosures need to be made in joint or separate sessions. Some suggestions for clarification of the rules are made in part 7. No such uncertainty exists in the professional conduct rules in the US. There, under the existing rules, legal practitioners owe mediators the same standard of disclosure as they owe to their opponents.

Neither the rules in Australia, nor those in the US, impose on legal practitioners obligations to disclose adverse facts to a mediator²⁷⁹ or to correct errors in statements made to the mediator by the other party.²⁸⁰

With respect to opponents, lawyers both in Australia and the US are prohibited (under the professional conduct rules and the general law) from making certain misrepresentations but they are not prohibited from posturing, bluffing, and even misrepresenting some matters such as bottom lines and settlement intentions. As a general rule, there is no obligation of candour owed to opponents.²⁸¹

The professional conduct rules do not impose on legal representatives, duties to participate in good faith or to cooperate with an opponent or with a mediator. Nor do such duties exist in general law absent an agreement between the parties or statutory provision to this effect.

The professional conduct rules require practitioners to act fairly, but in the context of mediation, that duty extends to compliance with guidelines set by the mediator. There is no general duty to ensure fair outcomes or to protect the interests of third parties although some areas of substantive law impose specific obligations in this regard (eg family law). However, in rare cases a lawyer's actions in securing an agreement might be considered so unfair as to amount to a breach of the practitioner's obligations to the administration of justice and to the court. Such an agreement might also be contrary to the principles of contract law and the law dealing with unconscionability.

²⁷⁸ See, eg, LCA Model Rules r 14.6; Barristers' Rules r 25; draft Solicitors' Rules 2010 r 19.6; draft Barristers' Rules 2010 r 31. A similar obligation is imposed by ABA Model Rules r 3.3.

²⁷⁹ Dal Pont, above n 25, 384, 386.

²⁸⁰ LCA Model Rules r 14.3. Also see draft Solicitors' Rules 2010 r 19.3.

²⁸¹ Peppet, above n 28, 478; Carter, Peden and Tolhurst, above n 160, 373; Gillies and Selvadurai, above n 161, who note that 'there is no general duty of disclosure in the common law': 123-31.

But despite the minimal requirements of the professional conduct rules, candour and cooperation are not prohibited by the rules. '[L]awyers are not ethically required to press for every advantage, take every permissible step, react to every point raised, or to otherwise play hardball'.²⁸² 'Nothing in the rules imposes an obligation to act in a win-lose manner designed to deprive opposing parties of fair terms'.²⁸³ The existing rules enable lawyers to cooperate, collaborate and use joint problem-solving methods, in the appropriate circumstances. This is perfectly consistent with the discharge of duties owed to a client for it will sometimes be in the best interests of the client for a lawyer to act cooperatively.

For the most part, legal representatives can decide for themselves the manner in which they conduct themselves in mediation (in the sense of choosing their preferred style and approach to negotiation) but they are bound to follow their clients' instructions with respect to some matters, including whether or not to disclose confidential information. However, when a lawyer feels that disclosure of information is required, there is room under the rules for the lawyer to press a client for permission to reveal the information or to withdraw, if that permission is not forthcoming. Case law supports this interpretation of the rules. Likewise, if the lawyer feels that a client is using mediation for an improper purpose, there is scope within the context of the existing rules for the lawyer to refuse to act for the client on the ground that to do so would involve a breach of the lawyer's duty to the administration of justice.

Some commentators are satisfied that current ethical and legal constraints are an adequate check on unethical behaviour in negotiation and mediation.²⁸⁴ However, other commentators assert that the standards of conduct set in the rules are too low for mediation.

As has been noted in this part, some efforts have been made to impose higher standards of conduct upon parties and their lawyers in mediation through contract (in the case of private mediations) or legislative directive (in the case of mandatory mediations). Many such agreements and directives require participants to act in good faith in the mediation and to cooperate with the mediator and with each other. However, there is little agreement on what

²⁸² Gary L Voegelé, Linda K Wray and Ronald D Ousky, 'Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes' (2006-2007) 33 *William Mitchell Law Review* 971, 1018.

²⁸³ Charles B Craver, 'Negotiation Ethics for Real World Interactions' (2010) 25 *Ohio State Journal on Dispute Resolution* 299, 311.

²⁸⁴ Rosenberger, above n 273, 628-9, 638; Norton, above n 161, 501.

terms such as ‘good faith’ and ‘cooperation’ require from the parties. Ultimately the imposition of these requirements might raise more problems than they solve.

Even more far-reaching proposals have been made for the promulgation of new rules of professional conduct for legal representatives in mediation. Most proposals for new rules rest on supposed differences (or similarities) between the processes of litigation, mediation and negotiation. It is appropriate therefore to examine these processes before considering proposals for reform of the rules of conduct. The processes are examined in the next part of the exegesis.

PART 3: A COMPARISON OF LITIGATION, MEDIATION AND NEGOTIATION

Mediation is often compared with litigation.²⁸⁵ This is not surprising since mediation emerged in Western cultures largely as a product of dissatisfaction with the traditional court system and, initially at least, it was conceived as an alternative to litigation.²⁸⁶

Mediation is also compared with unassisted negotiation (again, this is not surprising if one accepts that mediation is essentially facilitated negotiation). In the discussion below, I examine the features, objectives and values of these three processes beginning with litigation.

3.1 Litigation

3.1.1 The Features of Litigation

Litigation is a public process in which an impartial decision-maker (such as a judge) appointed by the state²⁸⁷ imposes a binding decision²⁸⁸ upon the parties to a legal dispute.²⁸⁹ Judges must determine the legal rights and obligations of the parties on the basis of 'legal rules, principles and policies'.²⁹⁰ They make their decisions on a rational basis after hearing evidence from, and reasoned arguments by, the contending parties.²⁹¹ Judges are confined to awarding a limited and standardised range of remedies that has developed alongside recognised 'causes of action'. A party may have a right to appeal against a decision. The outcomes of litigation can create legal precedents.

There are rules of procedure (such as the *Uniform Civil Procedure Rules 1999* (Qld) and the US *Federal Rules of Civil Procedure 2010*) which govern the manner and form in which proceedings are instituted, the steps taken to progress a matter to trial, and the trial (and

²⁸⁵ Boulle, above n 39, 140-2.

²⁸⁶ I R Scott, 'The Courts and Alternative Dispute Resolution' (1990) 56 *Arbitration* 176, 178.

²⁸⁷ Sward, above n 60, 308; Landsman, above n 60, 713-4; Stephan Landsman, 'The Decline of the Adversary System and the Changing Role of the Advocate in that System' (1980-1981) 18 *San Diego Law Review* 251, 252.

²⁸⁸ Whilst there are mechanisms available for enforcement of a judgment of the court, such as a warrant of execution against assets owned by the judgment debtor, there is no guarantee that a judgment can be satisfied.

²⁸⁹ Courts only deal with disputes which fall within a legally recognised cause of action.

²⁹⁰ Boulle, above n 39, 140.

²⁹¹ Landsman, above n 60, 713; Sward, above n 60, 309; Jerold H Israel, 'Cornerstones of the Judicial Process' (1992-1993) 2 *Kansas Journal of Law & Public Policy* 5, 12; Lon L Fuller, 'The Forms and Limits of Adjudication' (1978-1979) 92 *Harvard Law Review* 353, 386.

subsequent appeal, if there is one). These procedures came under intense scrutiny²⁹² in the mid-1980s with many commentators and official bodies asserting that the civil justice system in many common law jurisdictions was ‘in crisis’,²⁹³ crippled by excessive delay, cost and complexity in proceedings²⁹⁴ and out of reach of ordinary people.²⁹⁵ Procedures were considered to be too formal, inflexible and complex and too heavily reliant on inter-party regulation. At least until trial, the parties controlled the conduct, pace and extent of litigation without judicial intervention or oversight.²⁹⁶ The system was thought by some commentators to encourage a strongly adversarial approach.²⁹⁷ It was also criticized for being too heavily dependent on an ‘all-embracing trial’.²⁹⁸ Little time or effort was devoted to pre-trial activities including fact investigation, case preparation and exploration of settlement opportunities.

In the last three decades, substantial reforms have taken place in the civil litigation systems of many common law jurisdictions with the aim of making litigation quicker, more cost effective, less complex and overall, more accessible.²⁹⁹

²⁹² For details of the law reform commissions, parliamentary committees, government-appointed bodies and independent agencies involved in review of the civil justice systems in common law jurisdictions, see the citations provided by the Australian Law Reform Commission in ALRC 89, above n 10, [1.77]. In fact, work of this nature is ongoing: see VLRC, *Civil Justice Review Report*, above n 7; and Australian Government Attorney-General’s Department, ‘A Strategic Framework for Access to Justice in the Federal Civil Justice System’, Report by the Access to Justice Taskforce, Attorney-General’s Department (2009) ‘*A Strategic Framework for Access to Justice Report*’.

²⁹³ See, eg, Sir Gerard Brennan, ‘Key Issues in Judicial Administration’ (1997) 6 *Journal of Judicial Administration* 138, 139.

²⁹⁴ Lord Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) [1] (‘*Access to Justice, Interim Report*’).

²⁹⁵ See, eg, Brennan, above n 293, 139. For a more detailed discussion of perceived problems, see Bobette Wolski, ‘Reform of the Civil Justice System Two Decades Past – Implications for the Legal Profession and for Law Teachers’ (2009) 21 *Bond Law Review* 192, 192.

²⁹⁶ *Access to Justice, Interim Report*, above n 294, [5].

²⁹⁷ Geoffrey L Davies, ‘The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System’ (Paper presented at the 20th Australasian Institute of Judicial Administration Annual Conference, Brisbane, 12-14 July 2002) 7.

²⁹⁸ *A Justice Report, Going to Law: A Critique of English Civil Procedure*, Council of Justice, British Section of the International Commission of Jurists (1974) [76] (‘*ICJ Justice Report*’).

²⁹⁹ For a discussion of these reforms, see Wolski, above n 295. The various reform bodies published extensive lists of recommendations. See Wolski, above n 295, 198-199 for a discussion of the main recommendations made by reform agencies. For a complete list of the particular goals sought to be achieved by the Australian Law Reform Commission in formulating its recommendations for reform, see ALRC 89, above n 10, [1.154]. The Commission made 138 recommendations relating to a range of matters including practice, procedure and case management, legal costs and education, training and accountability. In particular, see ALRC 89, above n 10, [1.155].

Today many courts have implemented pre-litigation protocols aimed at putting the parties in a position where they may be able to settle cases early without litigation or at least, to clarify and narrow the issues in dispute.³⁰⁰ Typically, ‘protocols’ encourage more pre-litigation contact between the parties, better and earlier exchange of information, better pre-litigation investigation by the parties and negotiation with a view to settling the claim without court proceedings.³⁰¹ The trend to implement pre-litigation protocols seems likely to continue. In 2009, the National Alternative Dispute Resolution Advisory Council (hereafter NADRAC) recommended that legislation governing federal courts and tribunals require prospective parties to take ‘genuine steps’ to resolve a dispute before proceedings could be commenced.³⁰² In line with this recommendation, the *Civil Dispute Resolution Act 2011* (Cth) requires prospective litigants to lodge a ‘genuine steps statement’ with the court when commencing certain civil proceedings in the Federal Court of Australia or in the Federal Magistrates Court.³⁰³ The statement must detail what ‘genuine steps’ the parties have taken to resolve the dispute, or the reasons why no such steps were taken. The legislation does not mandate particular action but allows the parties involved to decide what steps are most appropriate in their circumstances.

A range of case management schemes have also been implemented by rules of court and practice directions in all of the major trial courts in relation to all cases.³⁰⁴ These schemes give courts more responsibility for ensuring efficient management and progression of cases through the pre-trial and trial phases. Although judges in common law systems were

³⁰⁰ For early examples of pre-litigation protocols, see those implemented in the Family Court of Australia (see *Family Law Rules 2004* (Cth) r 1.05 and Sch. 1, Pt. 1 for financial cases and Pt 2 for parenting cases) and those implemented for personal injuries actions in Queensland (the *Personal Injuries Proceedings Act 2002* (Qld) s 4(2), ss 20, 22-30, 36). Other examples of state initiatives include the pre-litigation requirements inserted into the *Civil Procedure Act 2005* (NSW) by the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) which will commence on a date to be proclaimed. Under this scheme, the parties are required, when filing initiating proceedings, to file a dispute resolution statement which specifies the steps taken to try to resolve the dispute or to narrow the issues in dispute or to outline the reasons why no steps were taken. The *Civil Procedure Act 2010* (Vic), which commenced operation on 1 January 2011, also imposed pre-litigation requirements on persons involved in a civil dispute (see ss 22, 33, 34 which required the parties to take ‘reasonable steps’ to resolve their disputes before commencing litigation) but the provisions were repealed by the *Civil Procedure and Legal Profession Amendment Act 2011* (Vic) which came into operation on 30 March 2011 and which instead permits the Victorian courts to impose specific protocols for specified civil proceedings.

³⁰¹ See, eg, requirements in relation to compulsory settlement conferences under the *Personal Injuries Proceedings Act 2002* (Qld) s 36.

³⁰² NADRAC, *The Resolve to Resolve Report*, above n 7, Recommendation 2.1, 35.

³⁰³ *Civil Dispute Resolution Act 2011* (Cth) s 6. The substantive provisions of this legislation commenced on 1 August 2011.

³⁰⁴ These procedural changes have been ongoing since the early 1970’s. The importance of active case management as a ‘central judicial function’ was recently emphasised by the Access to Justice Taskforce in its *Strategic Framework for Access to Justice Report*, above n 292, 106-10 and 166.

historically passive, case management schemes have given rise to the ‘managerial judge’ who plays a role in overseeing a case from the time of its inception to its conclusion. Common features of case management schemes include the stipulation of a timetable of events for proceedings, enforcement of these timelines, procedures requiring early exchange of documents and information between the parties and a narrowing of the issues in dispute, and mandatory pre-trial hearings and settlement conferences at which further efforts are made to settle the dispute and/or to give directions for the continued conduct of the action.³⁰⁵

Courts now have some capacity to ‘individualize’ cases especially when an ‘individual list’ case management system is used.³⁰⁶ As part of its case management regime, the court has tailored procedures to the types of matters involved (for example, there are special procedures for personal injury cases and for commercial cases); and it has created different tracks for different kinds of cases (assignment of cases usually depends on the amount of the claim and/or the complexity of the issues involved).³⁰⁷

A predominate feature of all case management schemes is the consideration given to the use of ADR procedures. In Australia, matters can be diverted to ADR before proceedings are commenced (as evidenced by the pre-litigation protocols of the Family Court);³⁰⁸ after commencement of proceedings;³⁰⁹ and even after trial and before an appeal, if an appeal is likely.³¹⁰ In Australia and the United States, the majority of courts have the power to refer parties to mediation with or without their consent.³¹¹

³⁰⁵ For discussion of the aims and key features of case management schemes, see Wolski, above n 295, 200-201. For a list of the court’s supervisory powers, see, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 367 and *Uniform Civil Procedure Rules 2005* (NSW) r 2.3.

³⁰⁶ Case management may take one of two main forms, namely, continuous control by a judge who personally monitors a case on an individual basis (referred to as an individual list) and control exercised by requiring the parties to report to the court (to a court registrar or master) at fixed milestones (referred to as a master list): Colbran et al, above n 77, 31; Wolski, above n 295, 208, footnote 105.

³⁰⁷ See, eg, Practice Direction No 6 of 2000 establishing a supervised case list and Practice Direction No 3 of 2002 (as amended by Practice Direction No 2 of 2008) establishing a commercial list.

³⁰⁸ *Family Law Rules 2004* (Cth) r 1.05 and Sch. 1, Pt. 1 for financial cases and Pt 2 for parenting cases.

³⁰⁹ See legislative provisions mentioned below n 311.

³¹⁰ See Supreme Court of Queensland Practice Direction 1 of 2005, Court of Appeal, Part C. Mediation at the appellate level ‘appears to be institutionalised’ in some overseas jurisdictions such as the US and Canada. See Wolski (and references cited therein), above n 295, 211, footnote 116.

³¹¹ See, eg, *Federal Court of Australia Act 1976* (Cth) s 53A; *Federal Magistrates Act 1999* (Cth) s 34; *Civil Law (Wrongs) Act 2002* (ACT) s 195(1); *Civil Procedure Act 2005* (NSW) s 26; *Uniform Civil Procedure Rules 1999* (Qld) rr 320, 323; *Alternative Dispute Resolution Act 2001* (Tas) s 5. In the case of the Family Court of Australia, the parties can only be referred to mediation with their consent: see the *Family Law Act 1975* (Cth) s 19B. Similarly, parties in family law or child support proceedings in the Federal Magistrates Court can only be referred to mediation with their consent. For an account of the legislative position in each jurisdiction in Australia, see Spencer and Brogan, above n 1, 272-304.

The behaviour of litigants and of their lawyers is now heavily regulated by legislation, rules of court and practice directions.³¹² In the absence of specific provisions, parties may apply to the court for directions and procedural orders. Courts have the power to sanction parties and lawyers for non-compliance with the rules and directions (such sanctions include adverse costs orders, removal of a case from the active list and even, the forced hearing of a case when a party is not ready to proceed).³¹³

Judges in Australia must discharge their official duties in accordance with the *Guide to Judicial Conduct* (2007), a document which ‘assumes a high level of common understanding on the part of judges of basic principles of judicial conduct, many of which are the subject of settled legal rules’.³¹⁴ One such principle prohibits judges from seeing litigants and their representatives separately.³¹⁵ (There is a ‘reciprocal’ obligation on legal practitioners to

³¹² See sources and references, above n 77. On the position in the US, see John Leubsdorf, ‘Legal Ethics Falls Apart’ (2009) 57 *Buffalo Law Review* 959.

³¹³ For a more detailed discussion of the court’s power, see Wolski, above n 295, 202-9.

³¹⁴ Chief Justice Murray Gleeson, Preface, *Guide to Judicial Conduct* (2nd ed, 2007), published by the Australian Institute of Judicial Administration (AIJA) for the Council of Chief Justices of Australia (hereafter ‘*Guide to Judicial Conduct*’). In the US, see the *ABA Model Code of Judicial Code* (February 2007) r 2.9.

³¹⁵ Judges do not communicate privately with the parties ‘save in the most exceptional circumstances’: *Guide to Judicial Conduct*, Chapter 4, Clause 4.3. Also see the *ABA Model Code of Judicial Code* r 2.9. Some judges may see the parties separately in some models of judicial mediation (when arguably, they are acting as mediators, rather than as judges). This model of judicial mediation seems to be the exception, rather than the rule. There is considerable debate on the question of whether or not judges can see the parties separately during the conduct of judicial mediations. Justice Marilyn Warren is firmly of the view that ‘[j]udges cannot caucus or confer with individual parties on a separate or private basis – mediators ordinarily do that’: see Marilyn Warren, ‘ADR and a Different Approach to Litigation’ (Paper presented at the Law Institute of Victoria, Melbourne, 18 March 2009) 3; and Marilyn Warren, ‘Should Judges be Mediators?’ (Paper presented at the Supreme & Federal Court Judges’ Conference, Canberra, 27 January 2010) 17. NADRAC has also raised concerns that judicial mediation which involves separate sessions with the parties may be incompatible with the constitutional role of judges exercising federal jurisdiction (see *The Resolve to Resolve Report*, above n 7, [7.42]). However, different practices appear to be adopted in various jurisdictions in Australia, the US and Canada. On this topic generally, see Louise Otis and Eric H Reiter, ‘Mediation by Judges: a New Phenomenon in the Transformation of Justice’ (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351. In his research on the topic of Judicial Mediation, Iain Field found some evidence that judge-mediators in the South Australian Supreme Court have engaged in separate meetings (although he notes that it is unclear what techniques were employed during the mediations): Iain Field, *Judicial Mediation and Ch III of the Commonwealth Constitution* (PhD Thesis, Bond University, 2009) 432. However, it seems that when this model is adopted, the judge is precluded from hearing any subsequent trial of the matter: see Field, 464; Warren, 2009, 4.

refrain from communicating in the opponent's absence with the court concerning any matter of substance in connection with current proceedings).³¹⁶

3.1.2 The Objectives of Litigation

The objectives claimed for litigation include:³¹⁷

- Resolution of legal disputes according to law³¹⁸ using procedures considered to be fair and 'acceptable both to the parties and to society'.³¹⁹
- Enforcement of legal rights and obligations. In this regard, Saltzburg observes that '[t]he goal of the adversary system is to apply the substantive legal principles so that those who have rights may claim them and those who have liabilities must face them'.³²⁰
- Behaviour modification.³²¹ The courts determine right and wrong and penalize wrongdoers with the aim of deterring socially unacceptable behaviour.³²²
- The determination of the truth of the events out of which disputes arise.³²³
- The quest for justice in accordance with various social values.³²⁴
- Interpretation and development of the law.³²⁵ Courts articulate principles which are relevant to the resolution of future legal disputes.³²⁶

³¹⁶ This prohibition is subject to some exceptions. Generally see LCA Model Rules r 18.6; Barristers' Rules r 56; draft Solicitors' Rules 2010 r 22.5; draft Barristers' Rules 2010 r 53.

³¹⁷ Sward, above n 60, 303. Also see John A Jolowicz, 'On the Nature and Purposes of Civil Procedural Law' (1990) 9 *Civil Justice Quarterly* 262, 271. These objectives can be whittled down and divided into primary and secondary objectives. Sward claims that the primary objectives of the litigation system are dispute resolution, rule-making and behaviour modification: Sward, above n 60, 303. The primary objectives are then 'tempered' by secondary objectives such as determination of the truth.

³¹⁸ Robert A Hughes, Geoff Leane and Andrew Clarke, *Australian Legal Institutions: Principles, Structure and Organisation* (Thomson Lawbook Co., 2nd ed, 2003) 152; Sward, above n 60, 305; Landsman, above n 60, 713; Landsman, above n 287, 492; Nagorcka, Stanton and Wilson, above n 21, 475; Jolowicz, above n 317, 271. At an even more basic and abstract level, Fuller notes that 'adjudication should be viewed as a form of social ordering, as a way in which the relations of men to one another are governed and regulated': Fuller, above n 291, 357.

³¹⁹ Landsman, above n 60, 714; Landsman, above n 287, 252; Sward, above n 60, 306; Jolowicz, above n 317, 271; Israel, above n 291, 6.

³²⁰ Stephen A Saltzburg, 'Lawyers, Clients and the Adversary System' (1986) 37 *Mercer Law Review* 647, 654. Also see Landsman, above n 287, 261.

³²¹ Sward, above n 60, 307.

³²² Kovach, *New Wine Requires New Wineskins*, above n 6, 952.

³²³ Sward, above n 60, 305; Kovach, *New Wine Requires New Wineskins*, above n 6, 948, 952; Israel, above n 291, 6. Also see Menkel-Meadow who refers to the 'truth-finding' goal: Carrie Menkel-Meadow, 'The Trouble with the Adversary System in a Postmodern, Multicultural World' (1996-1997) 38 *William and Mary Law Review* 5, 30.

³²⁴ Kovach, *New Wine Requires New Wineskins*, above n 6, 948; Sward, above n 60, 305; Menkel-Meadow, above n 323, 30; Nagorcka, Stanton and Wilson, above n 21, 475. Also see Geoffrey C Hazard Jr and Dana A Remus, 'Advocacy Revalued' (2010-2011) 159 *University of Pennsylvania Law Review* 751, 756.

- The articulation of public values.³²⁷ Courts also demonstrate the effectiveness of the law.³²⁸

Today, the courts endeavour to perform their functions using a process which is ‘just, accessible, efficient, timely and effective’.³²⁹ Hence, to the list of objectives mentioned above can be added ‘expeditious’, ‘efficient’, and even ‘accessible’ dispute resolution.³³⁰

3.1.3 The Values of Litigation

Important social values are reflected in the objectives mentioned in the last section. Litigation is said to promote the values of:

- Access to the law.³³¹
- Substantive or social justice³³² (through the application of substantive norms which recognize values such as human dignity, personal autonomy, protection of individual liberties and civil rights).³³³
- Individualism.³³⁴
- Self-determination, party participation and control.³³⁵
- The truth.³³⁶

³²⁵ Sward, above n 60, 306; Jolowicz, above n 317, 271.

³²⁶ Hughes, Leane and Clarke, above n 318, 152.

³²⁷ Robert A Baruch Bush, ‘Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation’ (1989-1990) *Journal of Contemporary Legal Issues* 1, 4.

³²⁸ Jolowicz, above n 317, 271.

³²⁹ In its review of the Australian federal civil justice system, the Australian Law Reform Commission articulated these five key objectives of the federal system of civil litigation ‘in performing the roles of rule making, determination and dispute resolution’: Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper No 20 (1997) [3.9]-[3.17] (hereafter ALRC IP 20). Objectives such as these are now captured in an ‘overriding objective clause’ which appears at the beginning of newly introduced civil procedure rules. See, eg, the *Uniform Civil Procedure Rules 1999* (Qld) which proclaims that the objective of the rules is to ‘facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense’: *Uniform Civil Procedure Rules 1999* (Qld) r. 5(1). Also see *Personal Injuries Proceedings Act 2002* (Qld) s 4.

³³⁰ Maurice Rosenberg, ‘Resolving Disputes Differently: Adieu to Adversary Justice?’ (1987-1988) 21 *Creighton Law Review* 801, 808-9.

³³¹ Peppet, above n 28, 501.

³³² Sharon Dolovich, ‘Ethical Lawyering and the Possibility of Integrity’ (2002) 70 *Fordham Law Review* 1629, 1634; Jonathan M Hyman, ‘Swimming in the Deep End: Dealing with Justice in Mediation’ (2004-2005) 6 *Cardozo Journal of Conflict Resolution* 19, 43; Bush, above n 327, 4.

³³³ See Sward, above n 60, 317-9; Kovach, *New Wine Requires New Wineskins*, above n 6, 951-2; Israel, above n 291, 6; Monroe Freedman, ‘Our Constitutionalized Adversary System’ (1998) 1 *Chapman Law Review* 57, 57, 73; Bush, above n 327, 4; Leonard L Riskin, ‘Mediation and Lawyers’ (1982) 43 *Ohio State Law Journal* 29, 30.

³³⁴ Sward, above n 60, 306, 310; Landsman, above n 60, 738.

³³⁵ Dolovich, above n 332, 1634.

- Fair, thorough, predictable and dignified procedures.³³⁷ '[P]rocedural norms reflect values such as community participation, a prescribed procedure, regularity, integrity, and promptness in application, and equality of treatment of like cases'.³³⁸

Litigation is considered to be a fair means of dispute resolution for two primary reasons (these reasons are commonly given for attachment to the adversary system).³³⁹ First, it provides a neutral ground for resolution of disputes by an impartial decision-maker³⁴⁰ (adversary presentation is thought most likely to combat decision-maker bias ie 'that natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known').³⁴¹ Second, it is believed to promote accurate results (ie to discover the truth) by permitting each side to gather and present evidence of relevant facts to the decision-maker.³⁴²

It is also argued that the adversary process reflects concern for 'individualized justice',³⁴³ (and that it is a highly individualistic system)³⁴⁴ in that it allows each litigant maximum control over the kinds of claims that he or she can assert (the court only hears disputes which the parties choose to submit to it)³⁴⁵ and the way in which those claims will be asserted. Litigants exercise control by defining the issues in dispute;³⁴⁶ preparing their cases;³⁴⁷ and presenting proofs and reasoned arguments for a favourable decision.³⁴⁸ According to Fuller, it

³³⁶ In relation to the significance of truth seeking, Chief Justice Spigelman asserts that '[t]he search for truth is a fundamental cultural value which, at least in Western civilisation, is a necessary component of social cohesion and of progress. The law must reflect that fundamental value and do so at the core of its processes': James J Spigelman, 'Truth and the Law' (2011) 85 *Australian Law Journal* 746, 750. Also see Michael Bayles, 'Principles for Legal Procedure' (1986) 5 *Law and Philosophy* 33, 39; Sward, above n 60, 304; Israel, above n 291, 6; Stephan Landsman, 'The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts' (1980) 29 *Buffalo Law Review* 487, 492.

³³⁷ Landsman, above n 287, 260; Deborah R Hensler, 'Suppose It's Not True: Challenging Mediation Ideology' [2002] *Journal of Dispute Resolution* 81, 95.

³³⁸ Israel, above n 291, 6 (citations omitted).

³³⁹ For discussion of the evolution of the adversary system, see Sward, above n 60, 319-26; Landsman, above n 60, 717-33.

³⁴⁰ Leonard S Rubenstein, 'Procedural Due Process and the Limits of the Adversary System' (1976) 11 *Harvard Civil Rights-Civil Liberties Law Review* 48, 48 (citations omitted).

³⁴¹ Fuller, above n 291, 383; Freedman, above n 333, 76.

³⁴² Rubenstein, above n 340, 48 (citations omitted); Landsman, above n 60, 714.

³⁴³ Freedman, above n 333, 87.

³⁴⁴ Landsman, above n 60, 738; Sward, above n 60, 353.

³⁴⁵ Jolowicz, above n 317, 271. It has to be conceded that this argument only holds true for plaintiffs/applicants. Litigation is coercive in the sense that a party against whom proceedings have been instituted must respond or risk judgment in default of appearance.

³⁴⁶ John A Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure' (2003) 52 *International and Comparative Law Quarterly* 281, 289.

³⁴⁷ Sward, above n 60, 354; Boule, above n 39, 140.

³⁴⁸ Fuller, above n 291, 364.

is this last feature which is ‘the distinguishing characteristic of adjudication’.³⁴⁹ Jolowicz also points out that it is an idea central to the adversary system that ‘it is for the parties and them alone to determine the information on which the judge may base his decision’.³⁵⁰ In this sense, the parties have a voice and the power of choice in the adjudication process.³⁵¹ ‘The choices made by the parties help focus the litigation upon the issues of greatest importance to them and facilitate decisions tailored to their needs’.³⁵² The litigation process protects individual autonomy by giving litigants ‘the greatest possible involvement in, if not control over, those decisions that affect our lives in significant ways’.³⁵³

3.1.4 Evaluation of the Claims Made for Litigation

Many of the objectives and values claimed for litigation are overstated eg it is acknowledged that the adversary system does not discover objective truth but the best possible approximation to the truth of the events out of which a particular dispute arose.³⁵⁴ There is no doubt that many people still find court procedures to be complicated and expensive.³⁵⁵ For those litigants represented by lawyers, their role in litigation may seem non-participatory at times.³⁵⁶ Some authors also doubt that the system preserves individual dignity.³⁵⁷

³⁴⁹ Ibid.

³⁵⁰ Jolowicz, above n 346, 289.

³⁵¹ Sward, above n 60, 310; Landsman, above n 60, 713-4, 738; Jolowicz, above n 317, 278.

³⁵² Landsman, above n 287, 495, 525; Landsman, above n 60, 715.

³⁵³ Freedman, above n 333, 87. Also see Rubenstein, above n 340, 48.

³⁵⁴ We recognise that truth is not knowable in an absolute sense. Hazard and Remus note that litigation is ‘capable of constructing authoritatively-accepted truth’ (not of discovering objective truth): Hazard and Remus, above n 324, 780. Also see Freedman, above n 333, 80; John A Jolowicz, ‘The Woolf Report and the Adversary System’ (1996) 15 *Civil Justice Quarterly* 198, 200-201; Sward, above n 60, 304; Landsman, above n 287, 492. More recently, see Spigelman, above n 336, 750-1 who discusses the restrictions on truth finding that arise by reason of application of a variety of legal rules (including rules of practice and procedure and exclusionary rules of evidence).

³⁵⁵ The problems may be exacerbated for self-represented litigants. As to continuing concerns about costs, see, for instance, the discussion concerning the ‘contemporary concerns about costs in civil litigation’ in Peter Cashman, ‘The Cost of Access to Courts’ (Paper presented at the Confidence in the Courts Conference, Canberra, 9-11 February 2007) 3-4.

³⁵⁶ Nolan-Haley, above n 138, 115.

³⁵⁷ Sward, above n 60, 317-9.

It may be necessary to give priority to some objectives over others but there is no agreement amongst judges and scholars on the order of priority. Some authors assert that dispute resolution is the most important objective of the litigation system;³⁵⁸ other authors put more emphasis on the public functions of the courts eg functions such as articulating public values and maintaining the rule of law.³⁵⁹ The perspective of individual litigants may also differ. While some litigants might be seeking affordable, fair and expeditious dispute resolution,³⁶⁰ other litigants may be looking for vindication and retribution.³⁶¹

Some of the claims made for litigation may actually conflict eg the objectives of speedy and efficient resolution of disputes may conflict with the objectives of individualised justice and the search for the truth.³⁶² The relative weight to be given to these objectives will depend on whether one looks at the system from a societal or individual perspective.³⁶³ On several occasions the courts in Australia have considered the relative weight to be given to overall court efficiency on the one hand and the interests of the parties in an individual case on the other. In *Queensland v JL Holding Pty Ltd*,³⁶⁴ the High Court of Australia, in a joint judgment by Dawson, Gaudron and McHugh JJ, stated that ‘the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim’.³⁶⁵ According to Bamford, the effect of this case was to significantly undermine case management schemes.³⁶⁶ Bamford’s view was shared by all members of the High Court of Australia in *Aon Risk Services Ltd v Australian National University*.³⁶⁷ In a joint judgment, the majority of the court was critical of the views expressed in *JL Holdings*. The court observed: ‘[w]hat may be just, when amendment is sought, requires account to be taken of

³⁵⁸ Nagorcka, Stanton and Wilson, above n 21, 475; Jolowicz, above n 317, 270-1; Sward, above n 60, 303; Freedman, above n 333, 63; Landsman, above n 287, 492.

³⁵⁹ Jolowicz points out that the dispute resolution function is for the benefit of society rather than for private citizens. He observes that ‘[c]ourts serve the public but they do not provide services to litigants’: Jolowicz, above n 346, 285. Also see Owen Fiss, ‘Against Settlement’ (1984) 93 *Yale Law Journal* 1073, 1076; Fuller, above n 291, 357.

³⁶⁰ Rosenberg, above n 330, 808-9.

³⁶¹ Craig A McEwen and Thomas W Milburn, ‘Explaining a Paradox of Mediation’ (1993) 9 *Negotiation Journal* 23, 26.

³⁶² See eg Landsman who asserts that, historically, the American adversary system (with its passive decision-maker) has favoured the goal of dispute resolution over the goal of searching for material truth: Landsman, above n 287, 492.

³⁶³ Saltzburg, above n 320, 656.

³⁶⁴ (1997) 189 CLR 146.

³⁶⁵ (1997) 189 CLR 146. The court overturned a decision of the trial judge not to grant leave to amend pleadings on case management grounds.

³⁶⁶ David Bamford, *Principles of Civil Litigation* (Lawbook Co., Thomson Reuters, 2010) 85.

³⁶⁷ [2009] HCA 27. See Bamford’s discussion of this case: *ibid* 86.

other litigants, not just the parties to the proceedings in question'.³⁶⁸ The court urged that more consideration be given to matters such as the effect of delay (especially in its effect upon other litigants) and costs. Bamford concludes that '[t]he practical effect of *Aon Risk Services* is yet to be seen but the High Court has reversed the return to the more laissez faire approach to litigation that *JL Holdings* was thought to facilitate.'³⁶⁹ In the future, more emphasis may be given to the need to avoid undue delay and waste of public resources and less to the interests of the parties in a particular case.

3.2 Mediation

3.2.1 The Features of Mediation

Mediation is a process of negotiation in which an acceptable third party (who need not be a lawyer) assists parties in dispute to reach an agreement. The subject matter of mediation need not give rise to a legally recognised cause of action. Parties are generally free to select the mediator (or mediators, if they choose a co-mediation model).³⁷⁰ In mediation, ultimate authority for decision-making rests with the parties.

The parties generally participate in mediation on a voluntary basis pursuant to an agreement between them. However, increasingly mediation is taking place, with or without the parties' consent, by court referral and pursuant to legislation.³⁷¹

Mediation takes place in a private forum and the parties may, and generally do, agree that the proceedings and the outcome are to remain confidential.³⁷² As a consequence, public scrutiny of the process and the outcome may be avoided, and no legal precedent is established.

³⁶⁸ *Aon Risk Services Ltd v Australian National University* [2009] HCA 27, [95]. Both cases took place in the context of requests to amend pleadings late in the proceedings. In *Aon*'s case, French CJ observed that it was 'a late and deliberate tactical change': [24].

³⁶⁹ Bamford, above n 366, 87. Also see NADRAC's discussion of these two cases: *The Resolve to Resolve Report*, above n 7, [7.4]-[7.5].

³⁷⁰ This is not the case in all court and tribunal-annexed mediation schemes or in quasi-government schemes such as those run by the state legal aid offices.

³⁷¹ See above n 312.

³⁷² There are limits to confidentiality in negotiation and mediation if the matter proceeds to litigation. See the discussion above n 255.

In most models of mediation, mediators control the process. While there are no fixed rules as to the process used, a sequence of stages³⁷³ can generally be discerned including: an opening statement by the mediator; party statements in which the parties, in turn, tell the mediator about their concerns and interests (the parties may raise all matters that they consider important including their emotional needs); identification by the mediator of areas of agreement and also of issues that need to be addressed; a stage in which the parties confer with each other for the purpose of generating and exploring multiple options and alternatives for settlement; a negotiation stage in which the parties may share information and ideas for resolution of the dispute, and a stage in which any agreements reached are fine-tuned and finalised. Parties in mediation usually engage in direct communication with each other for at least part of the time. But there are also multiple process variables in mediation eg a mediator may or may not meet with the parties and their representatives for a preliminary conference; may or may not meet the parties jointly (some mediations take place entirely by the mediator shuttling back and forth between the parties who are in separate locations); and may or may not see the parties with their legal representatives.³⁷⁴ Mediators may hold separate meetings with each of the parties at intervals throughout the process, a feature which is unique to mediation.

Although mediators may ask the parties to prepare documents for use in mediation, there is no necessity to prepare and file pleadings as is the case in litigation. Mediators do not have the coercive power of judges ie they cannot officially sanction parties for failure to comply with a request. Many of the procedural safeguards that exist in litigation, such as mechanisms for discovery of documents, are absent in mediation.

A variety of possible solutions may be considered in mediation (this is often considered one of the most advantageous features of the process). Parties can reach an agreement that reflects common sense or commercial sense rather than strict legal rights. This does not mean

³⁷³ It is common to conceptualise the mediation process as a series of stages. Taylor asserts: [t]he mediation process ... has universal process stages despite contextual differences': Alison Taylor, 'Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process' (1997) 14 *Mediation Quarterly* 215, 219. Also see Elizabeth F Beyer, 'A Pragmatic Look at Mediation and Collaborative Law as Alternatives to Family Law Litigation' (2008-2009) 40 *St. Mary's Law Journal* 303, 312. However, the number and purpose of each stage and the terminology used to describe the stages varies between authors. For example, Moore describes mediation as a 12-stage process: Moore, above n 39, 68-9. Boulle describes it in 10 stages (with each stage having various sub-stages): Boulle, above n 39, 235-250.

³⁷⁴ Some of the possible variable features of mediation are represented in the concept of 'the mediation abacus', depicted in Boulle, above n 53, 17-8. Also see Boulle, above n 39, 29-30 for a discussion of some of the variable features of mediation.

that mediation takes place in a legal vacuum. It is said that all negotiations take place in ‘the shadow of the law’.³⁷⁵ Parties in mediation are generally aware of their other dispute resolution options and of their legal rights and obligations and they tend to negotiate with these in mind.

Agreements reached in mediation are usually not automatically binding but the parties may enter into a legally binding contract (if the subject matter involves the formation of legal rights and obligations) and some mediated settlements are made the subject of consent orders or decrees.³⁷⁶ There is generally no provision for appeal or review of a mediated outcome.

Some standards and guidelines for the conduct of mediators have emerged. They are discussed later in this part of the exegesis.

3.2.2 The Objectives of Mediation

The following objectives are claimed for mediation:³⁷⁷

- Dispute resolution according to standards agreed by the parties (they may defer to legal standards or to any other standards they consider fair and appropriate) using a process considered by the parties to be fair.³⁷⁸
- Satisfaction of individual interests or needs.³⁷⁹
- Self-determination³⁸⁰ and empowerment. Mediation may enhance the parties’ ability to resolve future disputes.
- Recognition (ie a greater openness to, and acceptance of, the other party to the dispute).³⁸¹

³⁷⁵ This phrase is attributed to Robert H Mnookin and Lewis Kornhauser, ‘Bargaining in the Shadow of the Law’ (1979) 88 *Yale Law Journal* 950.

³⁷⁶ Wolski, above n 15, 523.

³⁷⁷ Boule, above n 39, 91-7; Tania Sourdin, *Alternative Dispute Resolution* (Lawbook Co., Thomson Reuters, 3rd ed, 2008) 18-24; Folberg and Taylor, above n 39, 7-10, 35-6; Peter Adler, Karen Lovaas and Neal Milner, ‘The Ideologies of Mediation: The Movement’s Own Story’ (1988) 10 *Law & Policy* 317, 331; and Christine B Harrington and Sally E Merry, ‘Ideological Production: The Making of Community Mediation’ (1988) 22 *Law & Society Review* 709, 715; Burns, above n 2, 701.

³⁷⁸ NADRAC, *A Framework for ADR Standards*, Report to the Commonwealth Attorney-General (April 2001) 13 (*‘A Framework for ADR Standards Report’*); Boule, above n 39, 91.

³⁷⁹ Bush and Folger, above n 59, 250 (the authors were referring to a problem-solving approach to mediation); Kovach, *New Wine Requires New Wineskins*, above n 6, 942.

³⁸⁰ Lande, above n 1, 892. Self-determination may be recognised as a separate value or as part of the empowerment value.

³⁸¹ Bush and Folger, above n 59, 89-91.

- “[P]roblem-solving,” rather than “adversarial” orientation to legal disputes and transactions’.³⁸²
- ‘[A]n orientation to joint, not individualized, problem-solving’.³⁸³
- ‘Responsive and particularized solutions’.³⁸⁴
- Mutually acceptable outcomes which are also fair and stable.³⁸⁵
- Outcomes which represent the best alternatives available (or Pareto optimal solutions)³⁸⁶ and maximization of joint gains.³⁸⁷
- Enhanced relationships (or at least, minimisation of damage to relationships).³⁸⁸
- Increased access to a ‘higher quality justice’³⁸⁹ (ie justice that is responsive to individual needs and reflective of the preferences of the parties).³⁹⁰
- Efficiency and effectiveness.³⁹¹

3.2.3 The Values of Mediation

Mediation is said to be premised on the following values:

- Party participation and autonomy.³⁹²

³⁸² Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 430.

³⁸³ Ibid 451-3.

³⁸⁴ Ibid 453.

³⁸⁵ Nancy A Welsh, ‘The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?’ (2001) 6 *Harvard Negotiation Law Review* 1, 16 (‘*Self-Determination in Court-Connected Mediation*’); Julia Ann Gold, ‘ADR Through A Cultural Lens: How Cultural Values Shape Our Disputing Processes’ [2005] *Journal of Dispute Resolution* 289, 311. As to the criteria used for judging outcome fairness in negotiation, there are ‘four basic, competing principles or rules – equality, need, generosity, and equity’: Nancy A Welsh, ‘Perceptions of Fairness’ in Schneider and Honeyman, above n 161, 165, 165 (‘*Perceptions of Fairness*’). Each person may have a different favoured principle. The closer the actual outcome of a negotiation to the outcome a negotiator anticipated based on the application of his or her favoured principle, the greater the likelihood he or she will perceive it as fair: Welsh, *Perceptions of Fairness*, 165. Compare this with the criteria used for judging procedural fairness, see below n 653.

³⁸⁶ A pareto-optimal outcome is one which ‘makes both parties better off or makes one party better off without making the other party worse off’: Gay G Cox and Robert J Matlock, ‘The Case for Collaborative Law’ (2004-2005) 11 *Texas Wesleyan Law Review* 45, 68. See the slightly different definition given by Carrie Menkel-Meadow, ‘Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or “The Law of ADR”’ (1991-1992) 19 *Florida State University Law Review* 1, 7.

³⁸⁷ Bush and Folger, above n 59, 250 (the authors were referring to a problem-solving approach to mediation); Burns, above n 2, 701.

³⁸⁸ Burns, above n 2, 701; Shapira, above n 31, 249; Nolan-Haley, above n 6, 1371.

³⁸⁹ Bush, *Ethical Standards in Mediation*, above n 2, 257; Boulle, above n 39, 92; Sourdin, above n 377, 21-2.

³⁹⁰ Menkel-Meadow, above n 386, 6; Burns, above n 2, 701.

³⁹¹ See Boulle, above n 39, 92-5 for a discussion of the meaning of these two terms. He describes effectiveness primarily in terms of the parties reaching agreement, but notes that there are several dimensions to this objective. It also relates to the durability of the agreement over time and the quality of the settlement outcome (which itself has several dimensions): Boulle, above n 39, 94-5.

³⁹² Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 453; Nolan-Haley, above n 6, 1371; Welsh, *Self-Determination in Court-Connected Mediation*, above n 385, 16.

- Process fairness.³⁹³
- Satisfaction of individual needs.
- Self-determination³⁹⁴ (promoting ‘subsidiary values of responsibility for choices and dignity of individuals’)³⁹⁵ and empowerment ie giving the parties an increased sense of their own personal efficacy.³⁹⁶
- Individualism³⁹⁷ which ‘assumes that the parties directly affected by disputes are the persons alone, independently of broader social networks, who should be involved in their resolution’.³⁹⁸
- A rational approach to decision-making, which ‘assumes that where the parties can be persuaded through argument, reality testing and risk analysis they will assess their options objectively and come to a decision which serves their interests’.³⁹⁹
- Consensuality of outcome.⁴⁰⁰
- Efficiency.

Some authors maintain that the ‘values’ of good faith participation, collaboration, and openness and honesty are essential at least in interest-based or collaborative negotiation.⁴⁰¹ Boulle mentions that non-adversarialism is also an often-cited value of mediation⁴⁰² but he correctly notes that ‘mediation provides “non-adversarial values” only in relation to its structures, procedures and outcomes, and this may, but does not necessarily, modify participants’ attitudes and behaviours.’⁴⁰³ Some mediations ‘frequently are quite

³⁹³ James J Alfini, ‘Mediation as a Calling: Addressing the Disconnect Between Mediation Ethics and the Practices of Lawyer Mediators’ (2007-2008) 49 *South Texas Law Review* 829, 830.

³⁹⁴ Shapira, above n 31, 258; Lande, above n 1, 861; Nolan-Haley, above n 6, 1371; Burns, above n 2, 701; Menkel-Meadow, above n 386, 6; Welsh, *Self-Determination in Court-Connected Mediation*, above n 385, 18-9; Gold, above n 385, 311.

³⁹⁵ Boulle, above n 53, 65. Also see Boulle, above n 39, 62-90 for a general discussion of the values claimed for mediation.

³⁹⁶ Bush and Folger, above n 59, 85-91. The values of self-determination and empowerment are linked. Mediation is said to foster the value of empowerment in ‘its capacity to encourage the parties to exercise autonomy, choice, and self-determination’: Bush, *Ethical Standards in Mediation*, above n 2, 268.

³⁹⁷ Boulle, above n 39, 85.

³⁹⁸ Ibid.

³⁹⁹ Boulle, above n 53, 67. In the most recent edition of this text, Boulle gives a slightly different explanation of a rational approach to decision-making, describing it as one which ‘assumes that where parties are exposed to information and argument, reality testing and risk analysis, they will assess their options objectively and come to decisions which serve their interests’: Boulle, above n 39, 85-6.

⁴⁰⁰ Boulle, above n 39, 87-9; Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 453.

⁴⁰¹ Parker and Evans, above n 17, 135; Parke, above n 11; Peter R Jarvis and Bradley F Tellam, ‘A Negotiation Ethics Primer for Lawyers’ (1995-1996) 31 *Gonzaga Law Review* 549, 551; Spencer and Hardy, above n 1, 620-1.

⁴⁰² Boulle, above n 39, 69.

⁴⁰³ Ibid 69-71.

adversarial’,⁴⁰⁴ a fact that does not destroy the nature of mediation. While settlement through collaboration is an objective of some mediations, ‘the essential nature of the process is not lost if the parties remain adversarial but agree to compromise their differences to avoid a strike or to save the expense and uncertainty of litigation.’⁴⁰⁵

3.2.4 Evaluation of the Claims Made for Mediation

As is the case with litigation, some of the claims made for mediation are overstated.⁴⁰⁶ For instance, given that many mediations involve no more than a single session of a few hours duration, it is unlikely that there is time to modify the parties’ underlying behaviour and to improve their capacity to resolve future disputes.⁴⁰⁷ Additionally, the parties do not have an unfettered right to determine their own dispute ie they ‘are not entitled to have it anyway they want it.’⁴⁰⁸ This is recognised by the fact that ‘[m]ediated agreements that are illegal or against public policy in terms of statute or common law norms will not be enforceable.’⁴⁰⁹

Some of the objectives and values claimed for mediation may conflict.⁴¹⁰ When mediation first emerged in the community environment in the 1970s (giving rise to the phrase ‘contemporary mediation movement’)⁴¹¹ it offered an opportunity to minimise state intervention in interpersonal disputes. However, the courts and administrative agencies are

⁴⁰⁴ Weckstein, above n 42, 509.

⁴⁰⁵ Ibid.

⁴⁰⁶ Susan S Silbey, ‘Mediation Mythology’ (1993) 9 *Negotiation Journal* 349; Kenneth Kressel and Dean C Pruitt, ‘Themes in the Mediation of Social Conflict’ (1985) 41 *Journal of Social Issues* 179, 184; James A Wall and Ann Lynn, ‘Mediation: A Current Review’ (1993) 37 *Journal of Conflict Resolution* 160, 177. More recently see Blechman, above n 59, 373-6; Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 407, 453; Burns, above n 2, 701.

⁴⁰⁷ Wolski, above n 15, 593-4.

⁴⁰⁸ Ibid 590.

⁴⁰⁹ Boulle, above n 39, 82.

⁴¹⁰ For a discussion about the ‘contradictory’ and conflicting objectives of mediation, see Boettger, above n 199, 8-12. Also see Alex Wellington, ‘Taking Codes of Ethics Seriously: Alternative Dispute Resolution and Reconstitutive Liberalism’ (1999) 12 *Canadian Journal of Law and Jurisprudence* 297, 310-11; Morris, above n 7, 304-7.

⁴¹¹ This phrase is used by Bush and Folger, above n 59, 1. Also see Welsh, above n 1, 578; Welsh, *Self-Determination in Court-Connected Mediation*, above n 385, 15. For a discussion of the history and emergence of mediation in Western cultures and on its use in traditional societies, see Wall and Lynn, above n 406, 161; Welsh, *Self-Determination in Court-Connected Mediation*, above n 385, 20; Gold, above n 385, 309-15; Kimberlee K Kovach, ‘The Intersection (Collision) of Ethics, Law, and Dispute Resolution: Clashes, Crashes, No Stops, Yields, or Rights of Way’ (2007-2008) 49 *South Texas Law Review* 789, 794; Dorothy J Della Noce, Robert A Baruch Bush, and Joseph P Folger, ‘Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy’ (2002-2003) 3 *Pepperdine Dispute Resolution Law Journal* 39, 39-41; Wolski, above n 41, 100-101. On the history of the modern mediation movement in the UK, see Andrew Boon, Richard Earle and Avis Whyte, ‘Regulating Mediators?’ (2007) 10 *Legal Ethics* 26, 27-9.

now the biggest users of mediation and ADR (as part of their case management initiatives).⁴¹² Mediation offers a way to alleviate congestion and delay in the court system. The courts emphasise the objectives and values of settlement, speed, efficiency of the judicial system, rational allocation of judicial resources and greater access ‘to justice’ at lower costs.⁴¹³ These objectives and values are not necessarily compatible with those of self-determination, empowerment, recognition and satisfaction of individual interests. Many commentators accuse the courts (and lawyers ‘seeking to maximise client gain’)⁴¹⁴ of coopting the process of mediation.⁴¹⁵ However, there has never been consensus regarding the objectives of mediation.⁴¹⁶ And as this discussion highlights, the objectives and values of mediation have changed over time.⁴¹⁷

The priority afforded to various objectives and values differs depending on whether one is looking at the issue from the perspective of society, individual disputants, the service provider, and the individual mediator – all of whom may select some objectives and values over others.⁴¹⁸ In fact, the very meaning of the objectives changes depending on one’s perspective.⁴¹⁹

In the end, the objectives and values of mediation may depend on the choices made by individual mediators. The choice of intervention made by a mediator reflects his or her ‘conception of the values and goals of the mediation process itself’.⁴²⁰ For this reason, Boulle concludes that ‘[u]ltimately ... the values of mediation are to be found in its application by

⁴¹² Wolski, above n 15, 582-3; Wolski above n 295, 210-13; Burns, above n 2, 701.

⁴¹³ For discussion of the objectives sought to be achieved by courts in using mediation, see Burns, above n 2, 701; Bush, *Ethical Standards in Mediation*, above n 2, 257; Welsh, *Self-Determination in Court-Connected Mediation*, above n 385, 22-3; Gold, above n 385, 515. Also see Wayne D Brazil, ‘Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts’ [2000] *Journal of Dispute Resolution* 11, 24.

⁴¹⁴ Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 418.

⁴¹⁵ Welsh, *Self-Determination in Court-Connected Mediation*, above n 385, 4.

⁴¹⁶ Welsh, above n 1, 576 (citations omitted).

⁴¹⁷ Menkel-Meadow, above n 323, 30. More recently, a ‘therapeutic value’ has been (re)emphasised with the interest in Therapeutic Justice with some authors claiming that mediators ‘ought to exercise their discretion in a way that promotes the psychological well-being of the parties’: Shapira, above n 31, 254-5.

⁴¹⁸ This is reflected in the work undertaken by NADRAC in developing ADR Standards. NADRAC examines and identifies the objectives of ADR from the perspective of the parties (or users of the services), ADR practitioners providing the service, objectives of governments, and society as a whole: NADRAC, *A Framework for ADR Standards Report*, above n 378, 13. Also see Blechman, above n 59, 373-6; Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 407, 453; Burns, above n 2, 701; Morris, above n 7, 305.

⁴¹⁹ See Boulle’s discussion of the meaning of efficiency from the differing perspectives of the mediating parties, governments and the courts and tribunals, and from the community point of view: Boulle, above n 39, 93-5. Also see Boettger who notes that efficiency can mean efficiency for the parties or for the courts: Boettger, above n 199, 7.

⁴²⁰ MacFarlane, above n 31, 51.

individual practitioners in particular cases.’⁴²¹ As a result, it is difficult to make generalised statements about the objectives and values of mediation.

3.3 Unassisted Negotiation

3.3.1 The Features of Negotiation

Unassisted or direct negotiation takes place whenever two or more parties confer with each other for the purpose of reaching an agreement on some issue, without the assistance of a third party facilitator such as a mediator. It can take place in a private forum and the parties may agree that the proceedings and the outcome are to remain confidential. As is the case with mediation, many of the procedural safeguards which exist in litigation, such as rules regulating disclosure of information, are absent from negotiation.

Unassisted negotiation has the potential to be the most flexible of all the dispute resolution processes (and possibly as a result, it is the most commonly used of all the processes).⁴²² It affords the parties the greatest control over the process by which their dispute is resolved. There are no formal rules or procedures except those agreed to by the parties. In reality, most negotiations follow a similar pattern or sequence of steps (described in detail in many texts on negotiation).⁴²³ In particular, it appears that unassisted negotiations involving lawyers are fairly predictable in pattern. As MacFarlane points out, unlike mediation, lawyer-to-lawyer negotiations tend to be highly ritualized in format (with lawyers formulating and rebutting substantive arguments based on the application of ‘the law’) often giving rise to a predictable and narrow band of ethical dilemmas.⁴²⁴

⁴²¹ Boulle, above n 53, 68. Also see Boulle, above n 39, 90. For a discussion of the linkages to be made between the intended objectives of mediation and the model preferred by a mediator, see Wellington, above n 410, 311. Also see MacFarlane who asserts that the choice of intervention made by the mediator reflects his or her ‘conception of the values and goals of the mediation process itself’: MacFarlane, above n 31, 51.

⁴²² Alvin B Rubin, ‘A Causerie on Lawyers’ Ethics in Negotiation’ (1974-1975) 35 *Louisiana Law Review*, 577, 578; Christopher W Brooks, ‘The Longitudinal Study of Civil Litigation in England 1200-1996’ in Wilfrid Prest and Sharyn Roach Anleu (eds), *Litigation: Past and Present* (UNSW Press, 2004) 26-7; Marc Galanter, ‘The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts’ (2004) 1 *Journal of Empirical Legal Studies* 459, 524; Marc Galanter, ‘Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society’ (1983) 31 *University of Cal Los Angeles Law Review* 4, 27.

⁴²³ See, eg Donald G Gifford, *Legal Negotiation: Theory and Practice* (Thomson West, 2nd ed, 2007) 35-8; Alexander and Howieson, above n 38, 63-7; Lewicki, Barry and Saunders, above n 20, 118-135.

⁴²⁴ MacFarlane, above n 31, 59-60.

In legal disputes, many parties negotiate with their legal rights in mind. However, there is potential to take into account non-legal interests and to fashion ‘creative’ solutions. Negotiated outcomes are not automatically binding but there are a number of options available to the parties to formalise the agreement and to make it binding.

3.3.2 The Objectives of Negotiation

Negotiation may be used for a number of purposes. For the purpose of this research, the primary objective of negotiation is taken to be dispute resolution. In addition, the parties may have secondary objectives. They may wish a negotiated agreement to meet certain criteria of success such as those articulated by Fisher and Ury, who define a successful agreement as one that:⁴²⁵

- meets the legitimate interests of all the parties to the extent possible;
- represents the best of the alternatives available (that is, it maximises the benefits and minimises the costs to all the parties);
- defines future cooperative interaction between the parties;
- is durable; and
- is reached through a fair process (without tactics such as threats) that promotes a good relationship between the parties or, at least, does not adversely affect their relationship.

According to Fisher and Ury, a successful agreement also takes community interests into account.

Alternatively, a party might simply want to reach an agreement, by whatever means are necessary (short of those that are illegal) that maximises his or her interests (limited only by the requirements of substantive law).

The objectives of most negotiations involving lawyers probably lie somewhere in between these two extremes: to reach a settlement that maximises the client’s interests, takes the other party’s interests into account tolerably well (at least to the extent needed to achieve

⁴²⁵ Fisher and Ury, above n 183, 4.

an agreement), is mindful of the interests of third parties and stays within the parameters of substantive law requirements.

3.3.3 The Values of Negotiation

Negotiation shares many of the same values as mediation, such as those of party participation, party autonomy and self-determination, satisfaction of individual needs and interests, and consensuality of outcomes.

3.4 Mediation: A Study in Diversity

3.4.1 Emerging Models of Mediation

Over time different styles of mediation have developed and received recognition. These styles of mediation differ from each other in the way they describe the purpose of mediation (and in the values to which priority is given) and the role of the mediators.⁴²⁶

A number of different styles or models of mediation have been identified. Boule identifies four paradigm models – the settlement, facilitative, therapeutic and evaluative models.⁴²⁷ The four models highlight the diversity of mediation practice and the fact that the objectives and values of mediation ultimately depend on the model favoured by the

⁴²⁶ Shapira, above n 31, 244.

⁴²⁷ Boule, above n 39, 43-7. Boule's framework is one of a number of categorisations available. One of the most well known is that of Riskin who classified mediator approaches to mediation by way of a grid consisting of two intersecting continuums, one representing the mediator's notion of the mediator's role using the concepts of 'facilitative' and 'evaluative', and the other dealing with the mediator's approach to problem-definition running from 'narrow' (limited to litigation-type issues) to 'broad' (encompassing personal, emotional, group, and third-party interests). The resulting grid consists of four style quadrants for facilitative narrow, evaluative narrow, facilitative broad and evaluative broad mediation styles. Whether called styles or models, they represent different theories about how mediators should act in relation to the parties. Generally see Leonard L Riskin, 'Decisionmaking in Mediation: The New Old Grid and the New New Grid System' (2003-2004) 79 *Notre Dame Law Review* 1, 3. Also see, eg, Michal Alberstein who discusses pragmatic, transformative and narrative models of mediation: Michal Alberstein, 'Forms of Mediation and Law: Cultures of Dispute Resolution' (2006-2007) 22 *Ohio State Journal on Dispute Resolution* 321, 325-31; James J Alfini, 'Trashing, Bashing, and Hashing it Out: Is This the End of "Good Mediation"?' (1991-1992) 19 *Florida State University Law Review* 47 who describes three different styles of mediation in Florida's court mandated mediation program; Bush, who identifies five types of mediators (settlors, fixers, protectors, reconcilers, and empowers): Bush, *The Dilemmas of Mediation Practice*, above n 2, 17-8; Mendel-Meadow who identifies six different models, each with a different focus or intended goal (Facilitative, Evaluative, Transformative, Activist, Pragmatic, Bureaucratic): Carrie Menkel-Meadow, 'The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices' (1995) 11 *Negotiation Journal* 217, 230.

mediator⁴²⁸ (and where the parties have a choice in the mediator, upon the model preferred by the parties). The fact that different models have been identified also highlights the lack of consensus by mediation practitioners and academics over the ‘proper’ objectives, values and practice of mediation. The models are discussed in more detail below.

Mediators in the *settlement* model of mediation tend to favour positional negotiation. Their interventions are aimed at moving the parties from fixed positions to a point of compromise. The main objective of settlement mediation is ‘[t]o encourage incremental bargaining towards compromise, at a “mid” point between parties’ original positional demands’.⁴²⁹ Mediators and parties using this model are concerned with the values of ‘compromise, effectiveness and efficiency’.⁴³⁰ Values such as party participation and empowerment are not a priority or even necessary elements of the process used.

In the *facilitative* model, mediator interventions are aimed at improving the processes of communication and negotiation between the parties. The objective of facilitative mediation is ‘[t]o avoid positions and negotiate in terms of parties’ personal and commercial needs and interests instead of legal rights and duties’.⁴³¹ In this model, participants will favour interest-based or integrative negotiation,⁴³² party participation and active listening to search for solutions which satisfy the parties’ legal and non-legal interests.⁴³³ As for values, Boule notes that this model ‘is based on values of self-determination, the relative priority of interests over rights and the need to acknowledge and validate views and emotions’.⁴³⁴ It stresses the value of satisfaction of the individual’s needs and desires.⁴³⁵

As suggested by its label, mediators in the *therapeutic* model use professional therapeutic techniques and focus on relationship issues.⁴³⁶ In this model, reaching agreement is not the primary concern. The therapeutic model of mediation is aimed at dealing ‘with underlying

⁴²⁸ MacFarlane, above n 31, 51; Blechman, above n 59, 373-6; Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 407; Burns, above n 2, 701; Boule, above n 39, 90.

⁴²⁹ Boule, above n 39, 44.

⁴³⁰ Ibid 63.

⁴³¹ Ibid 44.

⁴³² Shapira, above n 31, 248, footnote 18.

⁴³³ See Welsh’s discussion of facilitative interventions: Welsh, above n 1, 576. For further discussion on the facilitative model, see Alberstein, above n 427, 360; Samuel J Imperati, ‘Mediator Practice Models: the Intersection of Ethics and Stylistic Practices in Mediation’ (1997) 33 *Willamette Law Review* 703, 709-711.

⁴³⁴ Boule, above n 39, 63.

⁴³⁵ Bush and Folger, above n 59, 234, 238.

⁴³⁶ Boule, above n 39, 44. For further discussion of the ‘empowerment and recognition’ model, see Imperati, above n 433, 712-3.

causes of parties' problems, with a view to improving their relationship, through recognition and empowerment, as a basis for resolution of the dispute'.⁴³⁷ Its values are empowerment for self ie giving the parties an increased sense of their own personal efficacy with respect to process, goals, options, skills, resources and decision-making,⁴³⁸ and recognition of the other⁴³⁹ ie creating a greater openness to and acceptance of the person seated on the other side of the table⁴⁴⁰ by improving the pattern of interaction and communication between them.⁴⁴¹

In the *evaluative* model, mediators play a highly interventionist role. They may give the parties legal advice and offer them an opinion as to the range of outcomes likely to be handed down by a court. The objective in this model of mediation is '[t]o reach a settlement according to the legal (or other) rights and entitlements of the parties and within the anticipated range of court, tribunal or industry outcomes.'⁴⁴² Evaluative mediation tends to be the province of high profile lawyers and substantive experts who develop their own opinion about preferable settlement options and may try to influence the parties to accept them.⁴⁴³ Boulle observes that evaluative mediation 'assumes the value of the mediator's experience and expertise in guiding parties to accept normative or standard outcomes'.⁴⁴⁴ It honours the values of efficiency and protection of rights.⁴⁴⁵

These styles or paradigm models are not distinct alternatives to one another.⁴⁴⁶ They may operate in tandem eg a mediator might commence in the *facilitative* mode, but later move into the *settlement* or *evaluative* modes⁴⁴⁷ or they may operate simultaneously eg a mediator

⁴³⁷ Boulle, above n 39, 44. Bush favours 'the empowerment-and-recognition' conception as does Alberstein, see Bush, *Ethical Standards in Mediation*, above n 2, 258, 270; Alberstein, above n 427, 360.

⁴³⁸ Bush and Folger, above n 59, 85-7.

⁴³⁹ Boulle, above n 39, 63; Bush and Folger, above n 59, 89-91; Fuller, above n 291, 325.

⁴⁴⁰ Bush and Folger, above n 59, 85-91.

⁴⁴¹ Ibid 264.

⁴⁴² Boulle, above n 39, 44.

⁴⁴³ Lande, above n 1, 850, footnote 40; Boulle, above 39, 44.

⁴⁴⁴ Boulle, above n 53, 62.

⁴⁴⁵ For discussion of the evaluative model, see Imperati, above n 433, 711-2.

⁴⁴⁶ Boulle refers to these categories as archetypical models because they are not so much discrete forms of mediation practice but rather ways of conceptualising the different tendencies in practice: Boulle, above n 39, 43. As Riskin argues, evaluating and facilitating are not opposites but two ends of a continuum: Riskin, above n 427, 17-8. Also see Stempel, above n 472, 248 who argues that effective mediators use both types of interventions.

⁴⁴⁷ Boulle, above 39, 43. As Riskin notes, a mediator may move from one quadrant to another even within the same mediation, Riskin, above n 427, 3. For a description of Riskin's original ideas, see Leonard L Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 *Harvard Negotiation Law Review* 7. Riskin has modified his work and subsequently replaced it with the 'new new grid': Riskin, above n 427. He has replaced 'facilitative' with 'elicitive' and 'evaluative' with 'directive'

might use techniques associated with two, three or four models in a single mediation. This type of behaviour ie the use of a variety of styles by mediators during a single mediation (or even a single meeting with the parties) is the norm 'rather than the exception in the mediation of civil legal disputes'.⁴⁴⁸

3.4.2 Self-determination: A Central Value of Mediation

Despite the diversity of mediation practice, there is wide agreement that party self-determination is central to all models of mediation. It has been called '[t]he controlling principle of mediation';⁴⁴⁹ the driving value behind mediation;⁴⁵⁰ 'the most fundamental principle of mediation';⁴⁵¹ and the value that 'grounds every model of mediation'.⁴⁵² Alfini claims that self-determination is 'the one value that distinguishes mediation from other dispute resolution processes'.⁴⁵³ Standards of conduct for mediators also emphasise the importance of party self-determination.⁴⁵⁴ The *Model Standards of Conduct for Mediators* in the US define self-determination as 'the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome'.⁴⁵⁵

Informed consent on the part of the parties is essential to self-determination.⁴⁵⁶ The parties must have sufficient information (including information as to the available alternatives to an offered settlement) to make an informed decision.

According to relevant literature, the parties must also be able to make a decision voluntarily, absent coercion.⁴⁵⁷ I have argued previously that the parties in mediation are always subject to some degree of pressure to settle, much of it coming from the mediator, but

and he has replaced the grid with a series of grids differentiating between types of decision-making to make it more dynamic rather than static: Riskin, above n 427, 30, 34-50.

⁴⁴⁸ Dwight Golann, 'Variations in Mediation: How - and Why - Legal Mediators Change Styles in the Course of a Case' (2000) *Journal of Dispute Resolution* 41, 42; Riskin, above n 427, 14; Stempel, above n 472, 263.

⁴⁴⁹ Nolan-Haley, above n 6, 1374.

⁴⁵⁰ Lela Porter Love, 'Mediation: The Romantic Days Continue' (1997) 38 *South Texas Law Review* 735, 739.

⁴⁵¹ Alfini, above n 393, 830; John D Feerick, 'Toward Uniform Standards of Conduct for Mediators' (1997) 38 *South Texas Law Review* 455, 460; Laflin, above n 73, 496.

⁴⁵² Field, above n 3, 181.

⁴⁵³ Alfini, above n 393, 831.

⁴⁵⁴ See Australian National Mediator Standards, Practice Standards for Mediators Operating Under the National Mediator Accreditation System, September 2007, s 2.4.

⁴⁵⁵ Discussed in Laura E Weidner, 'Model Standards of Conduct for Mediators' (2005-2006) 21 *Ohio State Journal on Dispute Resolution* 547, 556; Imperati, above n 433, 714.

⁴⁵⁶ Weckstein, above n 42, 530.

⁴⁵⁷ Ibid 560.

that they always have the ability to accept or reject any particular outcome.⁴⁵⁸ This is the one constant feature of all definitions and models of mediation. Nolan-Haley agrees with this view, maintaining that it is the parties' retention of decision-making responsibility that distinguishes mediation from litigation.⁴⁵⁹ With this in mind, Weckstein observes that '[t]he challenge is to construct and conduct a mediation that maximizes disputant determination and avoids mediator coercion and uninformed disputants.'⁴⁶⁰

3.4.3 The Debate Concerning Evaluative Mediation

While all stakeholders in the mediation community agree that parties need to make an informed decision, there is some disagreement regarding the appropriate methods of informing them. This is an especially sensitive matter when there is an imbalance in knowledge between the parties as might be the case if only one party is (competently) represented. The argument might be made that the parties should inform each other – an argument which would support commentators who call for complete candour and honesty in mediation. I deal with this argument in part 4 of the exegesis. In particular, disagreement in the mediation community centres on what role the mediator should play in informing the parties. This disagreement lies at the heart of the debate about the appropriateness of evaluative mediation.⁴⁶¹

Some authors oppose the concept (and practice) of evaluative mediation.⁴⁶² They maintain that mediation should be solely facilitative in nature.⁴⁶³ Other authors are in favour of evaluative mediation⁴⁶⁴ principally on the grounds that it can further the objective and

⁴⁵⁸ See generally Bobette Wolski, 'Mediator Settlement Strategies: Winning Friends and Influencing People' (2001) 12 *Australasian Dispute Resolution Journal* 248.

⁴⁵⁹ Jacqueline M Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking' (1999) 74 *Notre Dame Law Review* 775, 790-1. Also see the definition of mediation offered by Weckstein, above n 42, 508. Even mandatory mediation still allows the parties self-determination. As Boettger observes in relation to mandatory mediation, 'the right to decline settlement preserves the fundamental fairness and voluntariness of mediation': Boettger, above n 199, 12, footnote 52.

⁴⁶⁰ Weckstein, above n 42, 502.

⁴⁶¹ See, eg, Moberly, above n 2, 669; Stark, above n 113.

⁴⁶² See, eg, Lela Love, 'The Top Ten Reasons Why Mediators Should Not Evaluate' (1997) 24 *Florida State University Law Review* 937.

⁴⁶³ Kimberlee K Kovach and Lela P Love, "'Evaluative' Mediation is an Oxymoron' (1996) 14 *Alternatives to High Cost of Litigation* 31. Kimberlee K Kovach and Lela P Love, 'Mapping Mediation: The Risks of Riskin's Grid' (1998) 3 *Harvard Negotiation Law Review* 71, 79-80 ('*Mapping Mediation*'). These authors criticise Riskin's grid for tending to legitimate evaluative activities: Kovach and Love, *Mapping Mediation*, 73. Generally see James J Alfini, 'Evaluative Versus Facilitative Mediation: A Discussion' (1997) 24 *Florida State University Law Review* 919.

⁴⁶⁴ Weckstein, above n 42, 552.

value of self-determination⁴⁶⁵ and that it ‘may be necessary in some cases to serve other acknowledged values, such as fairness, balance of power, needs and interests, and full disclosure’.⁴⁶⁶

Beneath the surface of this debate, there is disagreement on what is, and what is not, an evaluative intervention. Some of the authors who argue that mediation should be solely facilitative actually approve of the use of interventions which could fall into the evaluative category eg challenging proposals that seem unrealistic or suboptimal and ‘making suggestions about possibilities for resolution in order to stimulate the parties to generate options’.⁴⁶⁷ Stark would label these interventions as evaluative. He observes that evaluative mediation is not one behaviour:

but a continuum of behaviours, ranging from asking parties questions about case strengths and weaknesses, to providing information, to giving procedural and substantive advice, to making predictions of possible or probably court outcomes, to suggesting possible bases for resolving a dispute.⁴⁶⁸

Although much of the literature, discussion and training in mediation gravitates towards the facilitative model, so much so that it is sometimes referred to as the ‘standard’ model⁴⁶⁹ (it is ‘the style most frequently acknowledged publically by mediators’),⁴⁷⁰ there is evidence that evaluative mediation is extensively used and accepted.⁴⁷¹ The most highly sought after mediators are those who provide evaluative feedback.⁴⁷² Research also shows that the use of

⁴⁶⁵ Ibid 503. Even Welsh concedes that ‘mediator evaluation has the potential to aid party self-determination’: Welsh, *Self-Determination in Court-Connected Mediation*, above n 385, 57.

⁴⁶⁶ Moberly, above n 2, 678 (citations omitted).

⁴⁶⁷ Kovach and Love, *Mapping Mediation*, above n 463, 79-80. Stempel observes that many so-called ‘facilitative’ interventions also have an evaluative dimension: Jeffrey W Stempel, ‘Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator’s Role’ (1997) *Florida State University Law Review* 949, 960.

⁴⁶⁸ Stark, above n 113, 774 (citations omitted).

⁴⁶⁹ Boulle, above 39, 43. Also see Field, above n 2, 8 (who claims that facilitative mediation is the ‘dominant model of mediation practised in Australia’ although no evidence is given to support this claim).

⁴⁷⁰ Imperati, above n 433, 711.

⁴⁷¹ Weckstein, above n 42, 525; Welsh, *Self-Determination in Court-Connected Mediation*, above n 385, 26. Some models predominate in specific types of disputes (eg personal injury disputes tend to be evaluative in nature) or in mediations administered by certain types of institutions (eg community dispute resolution centres are more likely to use a facilitative model): Weckstein, above n 42, 507.

⁴⁷² Jeffrey W Stempel, ‘The Inevitability of the Eclectic: Liberating ADR from Ideology’ [2000] *Journal of Dispute Resolution* 247, 264; Stempel, above n 467, 973; Lande, above n 1, 851.

evaluative techniques is frequent in the mediation of civil legal disputes⁴⁷³ ‘even among mediators who favour a broad, facilitative approach’.⁴⁷⁴

Evaluative mediation is recognised by the *Australian National Mediator Standards*. The standards acknowledge that some mediators may use a ‘blended process’ model such as evaluative mediation or advisory mediation which may involve the provision of expert information and advice (including an opinion as to the range of outcomes likely to be handed down by a court) provided it is requested by the parties and is the subject of clear consent (normally ‘given through the use of a mediation or similar agreement’).⁴⁷⁵

Whatever one’s view on this debate, it has to be acknowledged that there are at least three potential problems with evaluative mediation: too much intervention by the mediator can impair self determination;⁴⁷⁶ intervention can take place without the parties knowing about it (because mediators can be subtle); and research shows that evaluative mediation ‘may incorporate practices that systematically favour the participation of one party over another’.⁴⁷⁷ As Stulberg notes, ‘the decision to be “evaluative” rather than “facilitative” in one’s orientation has serious repercussions with respect to the fairness of the process and the justice of the ensuring results’.⁴⁷⁸

Evaluative mediation certainly seems to be inconsistent with common conceptions about mediators and mediation ie that mediators are neutral and impartial and only facilitate negotiations (leaving the content and outcome of mediation to the parties).

In fact, a substantial body of research has provided evidence that mediators do not share common motives and orientations, are not ‘neutral’ in any absolute sense, and in fact actively influence what the parties can and cannot do in a mediation session in various ways, often coercively.⁴⁷⁹

The themes captured in this quotation are explored in more detail in the next section.

⁴⁷³ Golann, above n 448, 42.

⁴⁷⁴ Ibid.

⁴⁷⁵ Australian National Mediator Standards, Practice Standards for Mediators Operating Under the National Mediator Accreditation System, September 2007, ss 2.7, 10.5. See below n 494 for an explanation of this system.

⁴⁷⁶ Riskin, above n 427, 19.

⁴⁷⁷ Joseph B Stulberg, ‘Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock’ (1996-1997) 24 *Florida State University Law Review* 985, 993.

⁴⁷⁸ Ibid 994.

⁴⁷⁹ Noce, Bush and Folger, above n 411, 43 (citations omitted).

3.4.4 Factors Affecting Mediator Interventions

There is no consensus among mediation practitioners and scholars regarding the general approach to mediation which should be adopted by mediators⁴⁸⁰ and as to ‘mediator skills and behaviours that should characterize the mediation process’.⁴⁸¹ Mediators undertake a range of roles and functions (notwithstanding that these functions may be grouped broadly into categories for the purpose of analysis).⁴⁸²

Mediations will differ between mediators; they will even differ between mediations conducted by the same mediator. Important determinants of the strategies chosen by mediators include:⁴⁸³

- The mediator’s own personality and style.
- The training received by the mediator and the original professional orientation of the mediator.⁴⁸⁴
- The model of mediation (or combination of models)⁴⁸⁵ preferred and used by the mediator.
- The interests of the mediator.
- The cultural background of the mediator and of the parties for ‘[c]ultural precepts bar or hinder some strategies and enjoin others’.⁴⁸⁶
- The context in which the mediation takes place eg whether it takes place within the context of public policy, commerce, employment or the family.

⁴⁸⁰ Bush, *Ethical Standards in Mediation*, above n 2, 257. On the continuing debate over the role of mediators, see Brad Honoroff and Susan Opatow, ‘Mediation Ethics: A Grounded Approach’ (2007) 23 *Negotiation Journal* 155, 157; Moore, above n 39, 43-56; Boule, above n 39, 43.

⁴⁸¹ Welsh, above n 1, 575-6. This can make the question of mediator immunity tricky. Many schemes grant mediator’s immunity for actions undertaken in their role as mediator.

⁴⁸² Boule categorises mediator roles and functions into four general categories: creating favourable conditions for the parties’ decision-making; assisting the parties to communicate; facilitating the parties’ negotiations; and encouraging the parties to settle: see Boule, above n 39, 268-76. He notes that each category ‘encompasses a range of specific interventions in carrying out the general function’: 268.

⁴⁸³ Boule, above n 39, 267-8; Wolski, above n 458, 256-7.

⁴⁸⁴ Mediators tend to have a primary profession of origin (eg law) that generally includes ethical codes. They may continue to be subject to these codes when they mediate. They may also be strongly influenced by the norms and practices of their original profession.

⁴⁸⁵ Boule, above n 39, 267-8.

⁴⁸⁶ P H Gulliver, *Disputes and Negotiations: A Cross-cultural Perspective* (Academic Press, 1979) 220. On the effect of culture on choice of strategy, see Wall and Lynn, above n 406, 169; Wolski, above n 41. Since many of the values of mediation are culturally based, they may not be shared by mediators or parties from non-Western societies: Harold Abramson, ‘Crossing Borders into New Ethical Territory: Ethical Challenges When Mediating Cross-Culturally’ (2007-2008) 49 *South Texas Law Review* 921.

- The characteristics of the parties eg whether they are sophisticated professionals or relatively unsophisticated ‘first-timers’ in a family law matter.⁴⁸⁷
- The nature of the relationship between the parties and in particular, whether or not they are relatively equal in power.
- The nature of the dispute eg whether it is high or low conflict.
- The terms of any formal agreement to mediate and of any applicable professional standards.
- The institutional or agency setting in which the mediation takes place. Mediation will differ depending on whether it is private or court-based; and it will differ between service providers.
- ‘[T]he proximity of the dispute to the law’⁴⁸⁸ and the existence (or nonexistence) of a judicial alternative if mediation fails to resolve the dispute.⁴⁸⁹
- The time pressure operating on the parties.
- The likely outcomes of the mediation and the effect on the parties themselves and other affected parties.⁴⁹⁰

It is beyond the scope of this research to examine all of the factors listed above. In the discussion which follows, reference is made to two factors, mediator interests and the emerging standards of conduct for mediators. I am particularly interested in examining the motivation for, and scope afforded, mediators to influence the course and outcome of mediation.

3.4.5 Standards of Conduct for Mediators

In all respects for the purpose of this research, it is assumed that mediators adhere to currently established ethical guidelines for mediators. Ethical standards and guidelines have been developed for lawyer mediators in most jurisdictions by peak national bodies (in Australia, the Law Council of Australia and the Australian Bar Association)⁴⁹¹ and by the

⁴⁸⁷ Shapiro, Drieghe and Brett, above note 70, 113.

⁴⁸⁸ Laurence Boulle, *Mediation: Principles, Process, Practice* (Butterworths, 1996) 25.

⁴⁸⁹ Wolski, above n 72, 43-4 [67].

⁴⁹⁰ Menkel-Meadow, above n 16, xiv.

⁴⁹¹ See LCA, *Ethical Guidelines for Mediators* (at February 2006) which are separate from the LCA *Model Rules of Professional Conduct and Practice* (at 16 March 2002). Also see the *Australian Bar Association Model Rules* (8 December 2002) rr 117-118 (*‘Rules Regulating Barristers as Mediators’*) which have been

state and territory law societies and bar associations to which lawyers belong.⁴⁹² Additionally, relevant mediator standards have been developed by a number of other ADR practitioner accreditation organisations whose membership is not restricted to lawyers.⁴⁹³ Most recently, standards have been promulgated in connection with the National Mediator Accreditation System (hereafter NMAS) which commenced operation in Australia on 1 January 2008.⁴⁹⁴ While the *NMAS Practice Standards* are not classed as ethical standards, they provide some instruction on areas of practice likely to have ethical implications.⁴⁹⁵ Some standards have also been developed to govern the practice of mediation in particular subject-matter areas with family law being the best example⁴⁹⁶ and others have been developed to cover mediators in court-connected programs (regardless of the subject-matter).⁴⁹⁷

Most standards define the mediator's role in general terms as one in which he or she 'facilitates the resolution of a dispute by promoting uncoerced agreement by the parties to the dispute'.⁴⁹⁸ Mediators are tasked with facilitating communication, promoting understanding, and assisting the parties to negotiate an agreement.⁴⁹⁹

incorporated into the existing general professional practice rules for barristers (these have not been retained in the draft Barristers' Rules 2010). For the position in the US, see below n 493.

⁴⁹² See, eg, Law Society of New South Wales, *Revised Guidelines for Solicitors who act as Mediators* (at 1 January 2008); Queensland Law Society, *Standards of Conduct for Solicitor Mediators* (at 23 September 1998). Also see the Mediation Rule in the Law Society of Western Australia's Professional Conduct Rules (December 2005 Revision) r 8.

⁴⁹³ See, eg, the Institute of Arbitrators and Mediators Australia, *Principles of Conduct for Mediators* (2003). In the US, see the American Arbitration Association, the American Bar Association (Section of Dispute Resolution) and the Association for Conflict Resolution (formerly the Society of Professionals in Dispute Resolution), Joint Standards, *Model Standards of Conduct for Mediators* (2005).

⁴⁹⁴ The National Mediator Accreditation System (hereafter NMAS) is not restricted to lawyers. It is described as 'an industry based system which relies on voluntary compliance by mediator organisations that agree to accredit mediators in accordance with the requisite standards'. Such organisations are referred to as Recognised Mediator Accreditation Bodies (RMABs). Some existing mediator organisations, such as the state and territory law societies, have opted into the NMAS ie, they have become RMABs. In order to be approved (and to maintain ongoing approval) by a RMAB under the NMAS, mediators must meet the Approval Standards and they must commit to observe a set of thirteen practice standard for the conduct of mediation. See the Australian National Mediator Standards, Practice Standards For Mediators Operating Under the National Mediator Accreditation System (at September 2007) ('*NMAS Practice Standards*').

⁴⁹⁵ They are also tied into other ethical guidelines for standard 5.7 of the *NMAS Practice Standards* specifically provides that 'Mediators should adhere to, and be familiar with, the code of conduct or ethical standards prescribed by the organisation or association with which they have membership'.

⁴⁹⁶ See, eg, the 'obligations' imposed on Family Dispute Resolution Practitioners by the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth). In the US, see the Model Standards of Practice for Family and Divorce Mediation (2001).

⁴⁹⁷ Also see the National Standards for Court-Connected Mediation Programs and the Florida Rules for Certified and Court-Appointed Mediators (the latter being considered the most developed state standards in the US): Weckstein, above n 42, 527; Welsh, *Self-Determination in Court-Connected Mediation*, above n 385, 33.

⁴⁹⁸ LCA, *Ethical Guidelines for Mediators* (at February 2006) s 1. Also see the Law Society of New South Wales, *Revised Guidelines for Solicitors who act as Mediators* (at 1 January 2008) s 2.1; and the Mediation Rule in the Law Society of Western Australia Professional Conduct Rules (December 2005 Revision) r 8.1. For an academic's account of the mediator's role, see Weston, above n 187, 598. Mediator functions are specified in

The standards point to the existence of at least six central overlapping duties owed by mediators to the parties to a mediation (these duties are also founded in contract ie the Agreement to Mediate in the case of private mediations; in tort and in equity relying on a fiduciary relationship between the mediator and the parties).⁵⁰⁰ The duties are:⁵⁰¹ a duty to exercise reasonable care and skill in the conduct of the mediation (ie mediators owe the parties a duty of competence);⁵⁰² a duty to maintain procedural fairness;⁵⁰³ a duty to maintain impartiality towards the parties⁵⁰⁴ coupled with a duty to avoid actual and potential conflicts of interest;⁵⁰⁵ a duty to maintain the confidentiality of anything said or done at the mediation⁵⁰⁶ (which duty is subject to a number of exceptions);⁵⁰⁷ and a duty to terminate the

more detail in the Queensland Law Society, *Standards of Conduct for Solicitor Mediators* (at 23 September 1998) s 2.

⁴⁹⁹ LCA, *Ethical Guidelines for Mediators* (at February 2006) s 1. Also see Queensland Law Society, *Standards of Conduct for Solicitor Mediators* (at 23 September 1998) s 2.

⁵⁰⁰ The mediator is not an agent of any one party. 'Rather, the mediator has a duty to serve the parties and the situation in the aggregate rather than to represent either party as such': Stempel, above n 472, 263, footnote 65.

⁵⁰¹ For a list of matters with respect to which mediators under the NMAS Practice Standards are required to have ethical understanding, see *NMAS Practice Standards*, above n 494, s 7.3.c. For a discussion of the position under the Joint Standards, *Model Standards of Conduct for Mediators* (2005), see Weidner, above n 455.

⁵⁰² The *NMAS Practice Standards* provide that mediators 'should be competent and have the capacity to apply knowledge, skills and an ethical understanding and commitment' in a range of enumerated areas: *NMAS Practice Standards*, above n 494, s 7.3. Also see LCA, *Ethical Guidelines for Mediators* (at February 2006) s 4, comment (a).

⁵⁰³ *NMAS Practice Standards*, above n 494, s 9 (the standard sets out eight more specific mediator duties aimed at ensuring procedural fairness). Also see the Law Society of New South Wales, *Revised Guidelines for Solicitors who act as Mediators* (at 1 January 2008) s 4.3. Some authors express the view that mediators owe a duty of loyalty to the process ie to ensure integrity of process: Laflin, above n 73, 481. It might be better expressed as a duty owed to the parties to ensure that the process is conducted in certain ways. See, eg, Joint Standards, *Model Standards of Conduct for Mediators* (2005) s VI: Quality of Process (which requires the mediator to advance, among other things, party participation, procedural fairness and mutual respect).

⁵⁰⁴ See, eg, *NMAS Practice Standards*, above n 494, s 5. Also see LCA, *Ethical Guidelines for Mediators* (at February 2006) ss 1 and 2; the Mediation Rule in the Law Society of Western Australia Professional Conduct Rules (December 2005 Revision) r 8.3; the Law Society of New South Wales, *Revised Guidelines for Solicitors who act as Mediators* (at 1 January 2008) s 5; Joint Standards, *Model Standards of Conduct for Mediators* (2005) s II. For a discussion of the Joint Model Standards, see Paula M Young, 'Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR, and AAA Adopt Revised Model Standards of Conduct for Mediators' (2006) 5 *Appalachian Journal of Law* 195, 209.

⁵⁰⁵ A mediator must disclose any factors which might create a conflict of interest: see *NMAS Practice Standards*, above n 494, s 5.2; the Law Society of New South Wales, *Revised Guidelines for Solicitors who act as Mediators* (at 1 January 2008) s 5.4; LCA, *Ethical Guidelines for Mediators* (at February 2006), s 3; and the Mediation Rule in the Law Society of Western Australia Professional Conduct Rules (December 2005 Revision) r 8.4. For a discussion on the mediator's duty to avoid a conflict of interests under the Joint Standards, *Model Standards of Conduct for Mediators* (2005), see Young, above n 504, 210, 214-215.

⁵⁰⁶ The Law Society of New South Wales, *Revised Guidelines for Solicitors who act as Mediators* (at 1 January 2008) s 6. Also see LCA, *Ethical Guidelines for Mediators* (at February 2006) s 5; *NMAS Practice Standards*, above n 494, s 6; and the Mediation Rule in the Law Society of Western Australia Professional Conduct Rules (December 2005 Revision) r 8.7. Generally, see MacFarlane, above n 31, 52, 77.

⁵⁰⁷ The limitations will be set out in the agreement to mediate (if there is one) or the statute pursuant to which the mediation takes place and the standards of conduct. Also see the LCA, *Ethical Guidelines for Mediators* (at February 2006) s 5 and *NMAS Practice Standards*, above n 494, s 6.1(d) which provides the following

process in certain circumstances.⁵⁰⁸ This last duty raises an issue which is still open to debate ie the question of whether mediators also owe a duty to ensure a fair outcome.

The discussion which follows touches on those aspects of these duties most central to this exegesis – it does not cover the issues of conflict of interest and confidentiality in detail.

A Duty of Competence: The standards of conduct provide that mediators should be competent ie they should have the capacity to apply knowledge, skills and an ethical understanding and commitment in a range of enumerated areas, sufficient to satisfy the reasonable expectation of the parties.⁵⁰⁹ In reality, the scope of the duty of competence (and the tasks required to be performed to discharge that duty) depends on what the mediator perceives his or her role to be, which depends on the model/s of mediation favoured by the mediator and the purpose/s of the mediation, such as whether it is primarily to settle disputes, to improve the way the parties communicate, to facilitate negotiations, to promote transformation of the parties and their relationship or to evaluate the parties' respective claims.

A Duty to Ensure Procedural Fairness (and Terminate in Certain Circumstances): Whatever model of mediation is chosen by the mediator, the duty of competence includes a duty to ensure procedural fairness. In scoping out the mediator's duty in relation to procedural matters, the *NMAS Practice Standards* speak to the mediator:⁵¹⁰

1. supporting the parties to 'reach any agreement freely, voluntarily, without undue influence, and on the basis of informed consent',⁵¹¹
2. providing the parties with an opportunity to speak and to be heard and to articulate their interests and concerns;
3. encouraging and supporting 'balanced negotiations'; and

exception: 'where permitted by existing ethical guidelines or requirements and the information discloses an actual or potential threat to human life or safety'.

⁵⁰⁸ *NMAS Practice Standards*, above n 494, s 7.3.c.

⁵⁰⁹ For a more detailed discussion of the competences required by mediators, see Wolski, above n 15, 644-5. Also see *NMAS Practice Standards*, above n 494, s 7.3; LCA, *Ethical Guidelines for Mediators* (at February 2006) s 4, comment (a); the Mediation Rule in the Law Society of Western Australia Professional Conduct Rules r 8.6. Also see Weckstein, above n 42, 519; Honoroff and Opatow, above n 480, 157; Bush, *Ethical Standards in Mediation*, above n 2, 258-9.

⁵¹⁰ *NMAS Practice Standards*, above n 494, ss 9.1, 9.2, 9.4, 9.7 respectively.

⁵¹¹ *NMAS Practice Standards*, above n 494, s 9.1.

4. 'supporting the participants in assessing the feasibility and practicality of any proposed agreement' taking into account the parties' interests and where appropriate the interests of third parties, while leaving primary responsibility for resolution of the dispute with the parties.

The *NMAS Practice Standards* impose an obligation on mediators to recognise and manage power imbalances.⁵¹² The standards also recommend that mediators be alert to parties and advisers misusing mediation (eg to delay other proceedings or to buy time to divert assets), or otherwise acting in bad faith.⁵¹³ The *NMAS Practice Standards* and the *LCA Ethical Guidelines for Mediators* allow mediators to terminate the process if they consider that one or more of the parties is abusing the process or that 'there is no reasonable prospect of success'.⁵¹⁴ The agreement of the parties is not required in these circumstances.

The difficulty for mediators is to intervene to balance power and negotiations without negatively impacting the appearance of impartiality.

A Duty to Remain Impartial: Most standards of conduct require mediators to conduct mediation in an impartial manner. For example, the *NMAS Practice Standards* provide that a mediator 'must conduct the dispute resolution process in an impartial manner and adhere to ethical standards of practice'.⁵¹⁵ The standard defines impartiality as 'freedom from favouritism or bias either in word or action, or the omission of word or action, that might give the appearance of such favouritism or bias'.⁵¹⁶

⁵¹² *NMAS Practice Standards*, above n 494, s 4.

⁵¹³ *NMAS Practice Standards*, above n 494, s 11.1. Also see the Law Society of New South Wales, *Revised Guidelines for Solicitors who act as Mediators* (at 1 January 2008) s 8 which provides for termination of the mediation in certain circumstances. The broadest provision is contained in the Law Society of New South Wales, *Guidelines for Solicitors who act as Mediators* (at 1 January 2008) – it provides that each of the parties and the mediator has the right to withdraw from mediation at any time and for any reason without the agreement of the others: s 8.4.1.

⁵¹⁴ *LCA, Ethical Guidelines for Mediators* (at February 2006) s 6. Also see *NMAS Practice Standards*, above n 494, s 11.2.

⁵¹⁵ *NMAS Practice Standards*, above n 494, s 5. Also see *LCA, Ethical Guidelines for Mediators* (at February 2006) s 1 and 2; and the Mediation Rule in the Law Society of Western Australia Professional Conduct Rules (December 2005 Revision) r 8.3.

⁵¹⁶ *NMAS Practice Standards*, above n 494, s 5.1.

I have argued previously that mediators may not be impartial if ‘impartiality’ is taken to mean an absence of bias or preference in favour of one or other of the parties.⁵¹⁷ Mediators often develop such preferences. Not all authors agree with this view. Boulle regards impartiality as a core requirement in mediation. (Neutrality, he notes, is a less absolute requirement.)⁵¹⁸ By impartiality, Boulle means ‘an even-handedness, objectivity and fairness towards the parties during the mediation process’.⁵¹⁹ ‘It seems that what is really being emphasised is the need to be perceived to be impartial.’⁵²⁰

Early definitions of mediation also commonly referred to the mediator as a neutral third party⁵²¹ but in recent years, the concept of mediator neutrality has come under scrutiny (and the reference to neutrality has disappeared from some of the standards and definitions).⁵²² There is growing recognition that mediators cannot be neutral if ‘neutrality’ is taken to refer to disinterest in the outcome of a dispute and absence of influence over the outcome. As some authors put it, mediators lack neutrality ‘in any absolute sense’.⁵²³

⁵¹⁷ Wolski, above n 458, 249.

⁵¹⁸ Boulle, above n 53, 20-1. In the most recent edition of this text, Boulle draws a distinction between three elements of neutrality ie, disinterestedness, independence and impartiality: Boulle, above 39, 73-4. He asserts that impartiality is essential but that the other two aspects of neutrality can be waived: Boulle, above n 39, 75.

⁵¹⁹ Boulle, above 39, 73, 77.

⁵²⁰ Wolski, above n 458, 249. In fact, Weckstein maintains that ‘[t]he more realistic ethical standards for the practice of mediation do not mandate that a mediator *be* a neutral or impartial person but only require that the mediator *act* impartially’: Weckstein, above n 42, 510. Also see Gulliver, above n 486, 211; Weckstein, above n 42, 509-10; Kressel and Pruitt, above n 406, 190. MacFarlane also argues that ‘since notions of impartiality and expertise are inevitably culturally specific, they may not be universally embraced by mediators’: MacFarlane, above n 31, 52.

⁵²¹ In the first edition of his popular text on mediation, Moore described mediators as ‘acceptable, impartial, and neutral’ third parties: Moore, above n 68, 14. In a later edition of the text, he describes mediators merely as ‘acceptable’ third parties: Moore, 39, 15.

⁵²² See, eg, *NMAS Practice Standards*, above n 494, s 5 (although neutrality is mentioned in s 7); LCA, *Ethical Guidelines for Mediators* (at February 2006) ss 1 and 2; the Mediation Rule in the Law Society of Western Australia’s Professional Conduct Rules (December 2005 Revision) r 8.3. Also see Queensland Law Society, *Standards of Conduct for Solicitor Mediators* (at 23 September 1998) s 4.1 (although the heading mentions neutrality).

⁵²³ Susan Douglas, ‘Neutrality in Mediation: A Study of Mediator Perceptions’ (2008) 8 *Queensland University of Technology Law and Justice Journal* 139, 150; Tony Bogdanoski, ‘The “Neutral” Mediator’s Perennial Dilemma: to Intervene or Not to Intervene’ (2009) 9 *Queensland University of Technology Law and Justice Journal* 26, 39. Also see Burns who speaks of ‘the practical elusiveness of true or complete neutrality in the conduct of the mediation’: Burns, above n 2, 702.

The concept of mediator neutrality has not been entirely abandoned, at least, not by some commentators.⁵²⁴ Several authors recommend a movement away from a binary construct of neutrality (as something that either does or does not exist) and urge instead that mediator neutrality be reconceptualised or reframed as a situated, contextual concept⁵²⁵ although authors vary slightly between themselves as to how it should be reframed. Douglas reframes it in such a way as to enable mediators to intervene to foster party self-determination;⁵²⁶ while Astor reframes it to strengthen the concept of consensuality.⁵²⁷ These efforts to reconceptualise neutrality seek to make it legitimate for mediators to intervene to deal with the parties' problematic power relations⁵²⁸ and to 'ensure fair outcomes'⁵²⁹ – something which Astor proclaims may involve some equalization.⁵³⁰ Astor maintains that such an approach 'provides for the inevitable situatedness of mediators'.⁵³¹ It also means that the propriety of an intervention can only be evaluated in the particular context in which it occurs.⁵³²

Alison Taylor takes a slightly different view of neutrality. She suggests that neutrality might be viewed as a continuum ranging from 'strict neutrality' to 'expanded neutrality' and that a mediator might practise ethically anywhere along this continuum. A mediator who embraces the expanded neutrality concept would, among other things, 'feel a need to empower and power-balance between clients, and actively intervene between clients to help bargaining'.⁵³³

⁵²⁴ Douglas claims that there have been a number of responses to deal with the apparent inconsistency between the rhetoric of neutrality and the actuality of practice, ranging 'from calls to simply abandon neutrality as an integral component of mediation practice; calls to reframe its significance as no longer a core tenet of practice or to reframe it as a question of ethics; and calls to replace it with alternative legitimating principles.' Douglas, above n 523, 140 (citations omitted). Also see Kathy Douglas and Rachael Field, 'Looking for Answers to Mediation's Neutrality Dilemma in Therapeutic Jurisprudence' (2006) 13 *eLaw Journal* 177.

⁵²⁵ See, eg, Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 *Social & Legal Studies* 221, 221; Bogdanoski, above n 523, 36, 42; Douglas, above n 523, 155. Taylor asserts that '[n]eutrality is extremely context sensitive': Taylor, above n 373, 220.

⁵²⁶ See Douglas, above n 523, 155 who argues that self-determination can in turn be constructed to depict optimal exercise of the parties' exercise of power, individually and collectively.

⁵²⁷ Astor prefers to reconstruct neutrality in terms of the core mediation value of consensuality which she argues is about enabling all the parties 'to have the maximum control possible given their context and situation': Astor, above n 525, 234. Also see Bogdanoski, above n 523, 36.

⁵²⁸ Bogdanoski, above n 523, 36. Indeed, Astor asserts that mediators have an obligation to deal with power relationships in mediation: Astor, above n 525, 236.

⁵²⁹ Bogdanoski, above n 523, 43.

⁵³⁰ Astor, above n 525, 236.

⁵³¹ Ibid 221.

⁵³² Bogdanoski, above n 523, 38.

⁵³³ Taylor, above n 373, 227.

This line of argument from authors such as Douglas, Astor and Taylor raises some concern for clearly it is the mediator who determines when equalisation and power-balancing is required.

Still other commentators believe that the whole notion of neutrality is a ‘fiction’.⁵³⁴ Coben asserts that the reality is ‘the routine, but undisclosed mediator exercise of influence’.⁵³⁵ I agree with this view.

I have argued previously that mediators bring their own values and interests to mediation and that to some extent they encourage outcomes consistent with those values and interests.⁵³⁶ Generally, the primary goal of mediators is to achieve agreement between the parties.⁵³⁷ They may be motivated in their attempts by concern for the parties or for third parties; by their desire for the outcome to conform to certain norms and standards; by concern for their reputation or by the need to secure remuneration and future business.⁵³⁸ Either way, all mediators (even those using less interventionist models)⁵³⁹ use a range of strategies to influence the content and outcome of mediations. They may, for example, use questions creatively (mediators may use hypothetical questions to introduce ideas, create acceptable focal points for discussion, assist the parties to package offers and counter-offers and to engage in conditional linked bargaining; focusing questions to steer negotiations in a particular direction and leading questions to suggest ideas and possible answers). They may create opportunities to explore some (favoured) options, but not others; and use time deadlines to force concessions and prevent further exploration of options.⁵⁴⁰

⁵³⁴ James R Coben, ‘Gollum, Meet Sméagol: A Schizophrenic Rumination on Mediator Values Beyond Self-determination and Neutrality’ (2004) 5 *Cardozo Journal of Conflict Resolution* 65, 73.

⁵³⁵ Ibid 74.

⁵³⁶ Wolski, above n 458, 250. Silbey also refutes claims to mediator neutrality or disinterest: Silbey, above n 406, 351. Also see Gulliver, above n 486, 203.

⁵³⁷ Silbey and Merry, above n 70, 7; Wolski, above n 458, 250. As Weckstein notes ‘inherent in the nature of the mediator’s calling is a “bias” in favour of settlement ... and many mediators push hard to achieve that end’: Weckstein, above n 42, 510. Even mediators adhering to a therapeutic model of mediation are trained to reach for agreements, see H H Irving and M Benjamin, ‘An Evaluation of Process and Outcome in a Private Family Mediation Service’ (1992) 10 *Mediation Quarterly* 35; Shapira, above n 31, 261.

⁵³⁸ Shapira, above n 31, 218. See Wolski, above n 458, 250 for a discussion of possible mediator interests.

⁵³⁹ Much as it is useful to use the analytical models of settlement, facilitative, therapeutic and evaluative, these categories may disguise the extent to which all mediators may influence the course and outcome of mediation.

⁵⁴⁰ David Greatbatch and Robert Dingwall, ‘Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators’ (1989) 23 *Law and Society Review* 613, 617; Shapiro, Drieghe and Brett, above n 70, 101. Also see Wolski, above n 458, 255-6 for more comprehensive discussion of strategies used by mediators to direct parties towards outcomes that mediators consider acceptable.

The standards of conduct prohibit mediators from coercing the parties to settle.⁵⁴¹ However, the standards do not draw any clear dividing lines between what is, and what is not, ‘coercion’ and what is, and what is not, an appropriate intervention. The standards generally avoid referring to the specific interventions which mediators can make.⁵⁴² Mediators use a range of techniques which exert pressure to settle on the parties.⁵⁴³ Most techniques are subtle (eg emphasising the mutual benefits to be obtained by agreement and stressing the possible negative consequences of failure to agree); others are more obvious (eg indicating impatience or disapproval; using long silences; and holding lengthy sessions that facilitate compromise and wear the parties down).⁵⁴⁴

Mediators can even use a range of more directive techniques and still stay within the limits imposed by relevant standards of conduct.⁵⁴⁵ They may, for instance, give legal information.⁵⁴⁶ While the standards generally recognise that the first recourse should be to encourage the parties to consult independent counsel if they have not already done so,⁵⁴⁷ the standards allow a mediator to provide information ‘that the mediator is qualified by training or experience to provide’⁵⁴⁸ as long as the information is couched in general terms and at least, under standard 10.1 of the *Australian National Mediator Standards*, the parties have given informed consent. The standard recognises that this information-giving function is consistent with ‘preserving participant self-determination’.⁵⁴⁹ In the US, the *Model Standards of Conduct for Mediators* also leave ‘questionable wiggle room with regard to the facilitative versus evaluative debate’⁵⁵⁰ permitting mediators to take on additional dispute resolution roles in certain limited circumstances.⁵⁵¹

⁵⁴¹ *NMAS Practice Standards*, above n 494, s 2.5; the Law Society of New South Wales, *Revised Guidelines for Solicitors who act as Mediators* (at 1 January 2008) ss 2.2, 2.3; Queensland Law Society, *Standards of Conduct for Solicitor Mediators* (at 23 September 1998) ss 1.2, 7.1, 7.2.

⁵⁴² Boule, above n 39, 482-4. Also see Weckstein who urges that the ‘ethics of activist mediator interventions’ be given proper attention in standards for mediators: Weckstein, above n 42, 510.

⁵⁴³ For a detailed discussion of these techniques, see Wolski, above n 458, 248-262.

⁵⁴⁴ *Ibid* 251-4.

⁵⁴⁵ See, eg, Weckstein, above n 42, 545-6 on interventions which influence the course and outcome of mediation (most of which interventions can be considered as process suggestions and are acceptable to facilitative mediators).

⁵⁴⁶ A distinction between giving legal advice and giving legal information was made to avoid falling into the ‘unauthorised practice of the law’ trap: Weckstein, above n 42, 543. Weckstein notes that the distinction has been criticised as being too vague to guide mediator behaviour: Weckstein, above n 42, 544.

⁵⁴⁷ *Ibid* 530.

⁵⁴⁸ In the case of lawyer mediators, this would include information about legal norms: Weckstein, above n 42, 540, 549; Laflin, above n 73, 507.

⁵⁴⁹ *NMAS Practice Standards*, above n 494, s 10.1.

⁵⁵⁰ Weidner, above n 455, 566.

⁵⁵¹ *Ibid*.

There is considerable latitude in the standards for mediators to suggest options for settlement. For instance, the New South Wales Law Society's *Guidelines for Solicitors who act as Mediators* provide that mediators 'may raise and help the parties to explore options for settlement'.⁵⁵² They may also disclose to a party that her or his demands are inconsistent with precedents, trends and societal norms. As already noted above, the *NMAS Practice Standards* make provision for evaluative mediation or advisory mediation in some circumstances⁵⁵³ (with notice and the parties' consent).⁵⁵⁴

The opportunity to hold separate meetings at various intervals with each of the parties (with or without their legal representatives) is one of the most powerful 'tools' in the mediator's 'toolbox'.⁵⁵⁵ Generally, anything said between a mediator and a party during separate meetings is confidential and cannot be disclosed to the other party or parties without the express permission of the confiding party.⁵⁵⁶ Separate meetings can be used for positive non-manipulative purposes.⁵⁵⁷ But they can also be used by mediators to manipulate and control the flow and content of communications between the parties.⁵⁵⁸ Information can be re-shaped, modified, or omitted altogether. Mediators can also add their own interpretations, add new messages, or offer their opinions in a covert manner.⁵⁵⁹ For this reason, at least one author claims that mediation is naturally conducive to the use of deception - by the

⁵⁵² The Law Society of New South Wales, *Revised Guidelines for Solicitors who act as Mediators* (at 1 January 2008) ss 2.2, 4.4.

⁵⁵³ *NMAS Practice Standards*, above n 494, ss 2.7, 10.5. Also see the provision made for Family Dispute Resolution Practitioners by the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 29.

⁵⁵⁴ On the position under the Joint Standards, *Model Standards of Conduct for Mediators* (2005) in the US, see Young, above n 504, 225. Also see the Florida court mediation rules discussed in Welsh, *Self-Determination in Court-Connected Mediation*, above n 385, 34.

⁵⁵⁵ This terminology is attributable to Wade: see John H Wade, 'Tools From a Mediator's Toolbox: Reflections on Matrimonial Property Disputes' (1996) 7 *Australian Dispute Resolution Journal* 93. For a discussion of the use and abuse of separate meetings, see Wolski, above n 15, 603-6.

⁵⁵⁶ A number of standards address this point: see, eg, *NMAS Practice Standards*, above n 494, ss 6.2; LCA, *Ethical Guidelines for Mediators* (at February 2006) s 5; Queensland Law Society, *Standards of Conduct for Solicitor Mediators* (at 23 September 1998) s 5.2; the Law Society of New South Wales, *Revised Guidelines for Solicitors who act as Mediators* (at 1 January 2008) s 4.8.

⁵⁵⁷ For instance, separate meetings can be used to control the expression of emotions; redress inappropriate behaviour; acquire a range of information that the parties will not share in joint sessions; provide a safety zone for a party to consider proposals and to offer proposals without fear of commitment or loss of face; and encourage parties to consider the consequences of particular options, including the consequences of failing to reach agreement. Generally, see Wolski, above n 15, 603-606.

⁵⁵⁸ Silbey and Merry, above n 70, 14.

⁵⁵⁹ Gulliver, above n 486, 227; Cooley, above n 6, 265; James A Wall, 'Mediation: An Analysis, Review, and Proposed Research' (1981) 25 *Journal of Conflict Resolution* 157, 163.

mediator.⁵⁶⁰ The mediator standards offer no specific guidance to mediators about how truthful they must be in conducting mediations, and in particular, in acting as a conduit for information revealed in separate meetings.⁵⁶¹

The effectiveness of mediator strategies relies to a large degree on the mediator utilising various sources of power and influence.⁵⁶² The mediator's most obvious source of power derives from his or her ability to control the process and procedure of mediation.⁵⁶³ As Shapira notes, '[c]ontrol over process is a powerful tool of influence'.⁵⁶⁴ The standards give mediators broad and explicit power over procedural matters. Most of the interventions made by mediators can be justified as process interventions. Yet many of these interventions have a profound effect on the substantive outcome of the mediation.⁵⁶⁵ Shapira concludes: '[e]ven though mediators lack the formal power to impose an outcome on the parties, they are still powerful professionals who use a variety of powers in the exercise of their professional role, and have considerable influence on the parties, the process, and its outcome'.⁵⁶⁶

All mediators have the *ability* to influence the substance and outcome of mediations. They may also have an overriding ethical obligation to do so in some circumstances.

A (Possible) Duty to Ensure Fair Outcomes: There is a long-standing debate on whether or not mediators ought to be responsible for ensuring fair mediated outcomes. There are two issues involved here for an outcome might be considered unfair to one or more of the parties or it might have negative (and unfair) consequences for third parties not present at the mediation.

⁵⁶⁰ Cooley, above n 6, 265.

⁵⁶¹ Ibid.

⁵⁶² See Wolski, above n 458, 250-251 and sources cited therein for discussion of mediator sources of power and influence. In particular, see Bernard Mayer, 'The Dynamics of Power in Mediation and Negotiation' (1987) 16 *Mediation Quarterly* 75; John H Wade, 'Forms of Power in Family Mediation and Negotiation' (1994) 6 *Australian Journal of Family Law* 40; Silbey and Merry, above n 70, 12; Moore, above n 39, 278-81; Omer Shapira, 'Exploring the Concept of Power in Mediation: Mediators' Sources of Power and Influence Tactics' (2008-2009) 24 *Ohio State Journal on Dispute Resolution* 535, 541-58.

⁵⁶³ Wade identifies ten forms of power that a mediator has in relation to process, see Wade, above n 562, 20-23.

⁵⁶⁴ Shapira, above n 562, 556.

⁵⁶⁵ In the early years of the modern mediation movement, some authors maintained that there was a distinction between process and outcome. However, it now seems widely accepted that the *process* and the *substance* of negotiations cannot be separated: see Shapira, above n 31, 256; Shapiro, Drieghe and Brett, above n 70, 101; Silbey and Merry, above n 70, 12.

⁵⁶⁶ Shapira, above n 562, 568.

Assuming the procedure used is fair and that the proposed outcome does not involve the commission of an offence or fraud, should a mediator intervene to protect a party against a manifestly unfair agreement?

The matter is still highly contentious⁵⁶⁷ and there is no evidence of clear agreement on the issue in the literature.⁵⁶⁸ One of the reasons it is contentious is that it begs the question of what is fair. Mediators may not be in a position to make an objective assessment about fairness issues. They are also not well placed to ensure consistency. Hyman concedes that '[m]ediators rely on their intuitive moral sense to identify substantial unfairness'⁵⁶⁹ and that 'they have no standard vocabulary or method to do so'.⁵⁷⁰

Schuwerk asserts that the question of whether a mediator should remain completely impartial or should be 'free to intercede to some extent to protect one party – particularly if unrepresented – against a clearly unjust outcome, should be decided in favour of intervention'.⁵⁷¹ On the other hand, authors such as Bush and Stulberg take the view that 'it is not the mediator's job to guarantee a fair agreement, or *any* agreement at all; it *is* the mediator's job to guarantee the parties the fullest opportunity for self-determination and mutual acknowledgment'.⁵⁷² If a party makes what appears to be a free and informed choice, he or she can settle for less than they are entitled to – in the name of self-determination.

As with Schuwerk, Mendel-Meadow favours mediator intervention. She suggests that lawyer mediators should decline to approve or otherwise sanction an agreement which the mediator has reason to believe would cause injustice to any party (including third parties).⁵⁷³

⁵⁶⁷ MacFarlane, above n 31, 52.

⁵⁶⁸ Robert B McKay, 'Ethical Considerations in Alternative Dispute Resolution' (1990) 45 *Arbitration Journal* 15, 22.

⁵⁶⁹ Hyman, above n 332, 42.

⁵⁷⁰ Ibid.

⁵⁷¹ Schuwerk, above n 2, 764.

⁵⁷² Bush, *Ethical Standards in Mediation*, above n 2, 272. Similar views are expressed by Stulberg who argues that to intervene for the sake of fairness compromises the mediator's commitment to neutrality: Joseph B Stulberg, 'The Theory and Practice of Mediation: A Reply to Professor Susskind' (1981) 6 *Vermont Law Review Review* 85, 86-88; Peters, above n 6, 132; Riskin, above n 2, 330 (who argues that mediator intervention erodes the consensual nature of any agreement). Also see discussion of the Joint Standards, *Model Standards of Conduct for Mediators* (2005) s I, which Weidner asserts places self-determination before 'outcome fairness': Weidner, above n 455, 556.

⁵⁷³ Menkel-Meadow, *Non-Adversarial Lawyering*, above n 2, 167-8.

This brings the discussion to the second issue, of whether or not a mediator should intervene to protect the interests of unrepresented parties. The answer may depend in part on the subject matter of the dispute. Hobbs and Susskind suggest that mediators and possibly legal representatives have duties to parties beyond those at the mediation table in family law and public interest disputes.⁵⁷⁴ Susskind argues that mediators of environmental disputes ‘ought to accept responsibility for ensuring that agreements are as fair and stable as possible and that they set constructive precedents’.⁵⁷⁵ In family law matters, an obligation to consider the interests of children is imposed on mediators (and legal representatives) by relevant legislation.⁵⁷⁶ Alison Taylor agrees that it is appropriate for mediators to ‘suspend client self-determination’ and intercede when parents agree to a course of action for their child which is contrary to law.⁵⁷⁷

Several authors take a more moderate approach on this issue. Hyman believes that a mediator should deal with matters of fairness and justice in mediation but only to a limited extent - in much the same way as lawyers might deal with moral issues in an interview with a client - by non-directive discussion of fairness and justice issues after which the parties are free to determine the final outcome.⁵⁷⁸ A similar view is expressed by Hughes who suggests that the mediator should assist the parties to assess any agreement they reach for its fairness and enforceability without the mediator taking responsibility for the content of the agreement.⁵⁷⁹ This appears to be the position adopted in relevant mediator standards, which impose upon mediators duties to help the parties reach a fair and equitable settlement (eg by raising questions as to the fairness, equity and feasibility of proposed options for settlement)

⁵⁷⁴ Steven H Hobbs, ‘Facilitative Ethics in Divorce Mediation: A Law and Process Approach’ (1987-1988) 22 *University of Richmond Law Review* 325, 327, 339; Lawrence Susskind, ‘Environmental Mediation and the Accountability Problem’ (1981) 6 *Vermont Law Review* 1, 40-1 (*‘Environmental Mediation’*); Lawrence Susskind, ‘Expanding the Ethical Obligations of the Mediator: Mediator Accountability to Parties Not at the Table’ in Menkel-Meadow and Wheeler, above n 16, 513, 514-518.

⁵⁷⁵ Susskind, *Environmental Mediation*, above n 574, 4-6. Also see Senecah who argues that mediators in environmental matters have an obligation to influence the outcome to assist participants ‘to avoid or minimize’ negative fallout in the future: Susan L Senecah, ‘Current Issues Facing the Practice of Environmental Mediation’ (2000) 17 *Mediation Quarterly* 391, 397. Generally, see Jennifer Gerarda Brown, ‘Ethics in Environmental ADR: An Overview of Issues and Some Overarching Questions’ (1999-2000) 34 *Valparaiso University Law Review* 403. Brown suggests that the mediator may fill in some of the gaps if the parties fail to give due consideration to the interests of the public: 421.

⁵⁷⁶ Honoroff and Opatow, above n 480, 158; MacFarlane, above n 31, 52. In England and Wales and Australia, the law dictates that the children’s welfare is paramount. Generally see Lisa Webley, ‘Divorce Solicitors and Ethical Approaches – The Best Interests of the Client and/or the Best Interests of the Family?’ (2004) 7 *Legal Ethics* 231, 247.

⁵⁷⁷ Taylor, above n 373, 222.

⁵⁷⁸ Hyman, above n 332, 32, 37, 44.

⁵⁷⁹ Hughes, above n 6, 259-60.

and to ensure consideration of the interests of vulnerable parties and other affected and absent third persons - while leaving primary responsibility for the decision with the parties.⁵⁸⁰

3.4.6 The Exercise of Discretion by Mediators

The principles articulated in relevant mediator standards may conflict. Such a conflict may arise, for instance, if a mediator considers that one party cannot make a fully informed decision because the other party is withholding material information known to the mediator because it was disclosed in separate session (the duty of confidentiality owed to one party potentially conflicts with the duty to ensure procedural fairness and possibly, with a duty to ensure outcome fairness).

When such a conflict arises, mediators can look to the relevant standards and guidelines but they are unlikely to find specific answers there. The standards of conduct for mediators, as for lawyers, are stated in general terms – according to some authors, they are too general.⁵⁸¹ Macfarlane opines that codes of conduct for mediators ‘are merely generalized, albeit worthy, sentiments into which mediators will read their own version of moral relativism’.⁵⁸² When ethical dilemmas arise in practice, Macfarlane claims that ‘mediators are left with wide discretion and without adequate guidance, in a process which constantly requires mediators to make decisions with ethical implications’.⁵⁸³

However, Macfarlane and other commentators are actually in favour of broad general standards of conduct for mediators.⁵⁸⁴ For example, Pou favours broad codes which allow mediators flexibility to use ‘intuition, judgment, and proficiency’;⁵⁸⁵ codes which will allow mediators to be ‘reflective rather than prescriptive’.⁵⁸⁶ He suggests that mediator ethical expectations ‘will, and should, depend on case-specific factors’⁵⁸⁷ including the location of a

⁵⁸⁰ *NMAS Practice Standards*, above n 494, ss 9, 10.4. See Young for discussion of the Joint Standards, *Model Standards of Conduct for Mediators* (2005) s VI(A); Young, above n 504, 216. Also see the standards and guidelines for mediators discussed in Boule, above n 39, 481.

⁵⁸¹ Pou, above n 2, 202; Field, above n 3, 178.

⁵⁸² MacFarlane, above n 31, 87. The same observations are made by Pou, above n 2, 202.

⁵⁸³ Shapira, above n 31, 252-3 (citations omitted).

⁵⁸⁴ MacFarlane, above n 31, 65.

⁵⁸⁵ Pou, above n 2, 211.

⁵⁸⁶ *Ibid* 222.

⁵⁸⁷ Pou, above n 2, 209. The same argument is advanced by Weckstein, above n 42, 555, 557. Some authors claim that we need specific standards of conduct for ‘variant types of mediation’: Alison E Gerencser,

particular mediation process (eg court-annexed, agency-based, or purely private); the substantive nature of the dispute (eg family, commercial, neighbourhood); ‘the sophistication level of the parties, or their explicit expectations as to how a mediator will assist them’;⁵⁸⁸ the goal of the mediation process and which of the various styles or approaches a mediator follows (eg whether facilitative, evaluative or transformative).⁵⁸⁹ In essence, Pou’s view is ‘that variations in ADR settings do and should, have an impact on expectations about what mediator behaviour is appropriate (or ethical or unethical)’.⁵⁹⁰

Pou argues further that mediator standards are beginning ‘to be defined very differently by practitioners in different settings’⁵⁹¹ and that concepts such as impartiality and self-determination are ‘calling for different reactions’, depending on whether the mediator is involved in eg a family dispute involving the long-term welfare of children, a commercial case involving sophisticated business people, or an international dispute.⁵⁹² We have seen this ‘malleability’ already with the concepts of neutrality and impartiality. Mediators are giving these concepts context-specific meanings.

Several authors argue that existing mediator ethics need to be reassessed to allow for *more* responsive, reflexive conduct by mediators. For example, Honoroff and Opatow criticise the current approach to the formulation of mediator ethics. It is their view that current ethical mandates have been derived from a particular conception of the mediator’s role – a conception that they call a ‘top down’ approach. Honoroff and Opatow suggest instead that a ‘bottom-up’ approach be used (an approach they refer to as ‘grounded ethics’),⁵⁹³ allowing mediators to make ethical judgments that are more contextualized, ‘guided by the particulars, the substance, and the context of the dispute’.⁵⁹⁴

‘Alternative Dispute Resolution Has Morphed Into Mediation: Standards of Conduct Must Be Changed’ (1998) 50 *Florida Law Review* 843, 864.

⁵⁸⁸ Pou, above n 2, 209.

⁵⁸⁹ Ibid.

⁵⁹⁰ Pou, above n 2, 201 (citations omitted). Also see Stempel who advances the same argument: Stempel, above n 472, 248. Field argues in favour of ‘a contextual ethical method’ for mediators ‘because it would respond to the special and unique character of the mediation process itself – its contextual and relational quality, and the intuitive, responsive, reactive and integrated nature of its practice’: Field, above n 2, 10.

⁵⁹¹ Pou, above n 2, 202.

⁵⁹² Ibid 203.

⁵⁹³ Honoroff and Opatow, above n 480, 166.

⁵⁹⁴ Ibid 168.

Macfarlane also proposes that we should adopt new ‘context-responsive’ ways of thinking about mediation ethics.⁵⁹⁵ She calls for the adoption of a ‘reflective-practice’ approach as an alternative or complementary vehicle to codes of conduct for mediators,⁵⁹⁶ a model which requires practitioners ‘to develop a capacity for reflective self-analysis of their effectiveness in practice situations’.⁵⁹⁷ In essence, ‘[t]he outcomes of ethical judgments by mediators must be supported by the reasoned and contextual perspective of that mediator and that mediation’.⁵⁹⁸

Critically for the arguments in this exegesis, Macfarlane asserts that ethical dilemmas in mediation are less predictable than those in litigation and that ‘the exercise of individual discretion by the mediator is inevitable’.⁵⁹⁹

3.5 Summary and Review

There are a number of similarities and differences in the processes of litigation, mediation and negotiation. As will be discussed further in the next part of this exegesis, proponents for new rules rely on these ‘similarities and differences’ to argue in favour of new rules of conduct for legal representatives in mediation. However, there are at least three common problems with many of these comparisons, especially with those made between litigation and mediation. First, commentators assume that mediation is a standard process – it is not. They also assume that mediation has an agreed core set of objectives and values – it does not. At one extreme, mediation may resemble litigation – at the other, it may be more like a tea party. As has been demonstrated in this part, the objectives and values may vary from one mediation to the next.

Second, commentators often compare the ideal functioning of one process (mediation) with the actual functioning of another (litigation) forgetting that processes that are analytically distinct can, in practice, be identical. For example, it is claimed that mediation

⁵⁹⁵ MacFarlane, above n 31, 73, 70.

⁵⁹⁶ Ibid 56.

⁵⁹⁷ Ibid 72.

⁵⁹⁸ MacFarlane, above n 31, 71. Also see Barbara Wilson, who argues that mediators should respond ‘reflectively and reflexively to the process and content’: Barbara Wilson, ‘Mediator Ethics: What Does the ADR Literature Say?’, Paper available at <http://ssrn.com/abstract=1574438>, 20.

⁵⁹⁹ MacFarlane, above n 31, 62.

focuses on interests, creative problem-solving and on the future.⁶⁰⁰ Litigation is a truth-seeking process which is past oriented, focuses on the facts, and determines right and wrong according to law. While it is true that in mediation each party can retain their different perceptions of the facts and reach agreement despite the differences,⁶⁰¹ frequently fact-finding, legal argument and even apportioning of blame also occur.

Third, comparisons are often drawn to mediation and an out-dated version of litigation. Boulle notes that '[l]itigation is not, however, a static system and some of the contrasts between mediation and litigation are based on overstated and outdated features of the latter, such as its formality, inflexibility and binary outcomes'.⁶⁰² In reality litigation now consists of a series of events, many of which are aimed at narrowing the differences between the parties and encouraging settlement.

In some respects, the objectives and values of these dispute resolution processes show a remarkable similarity which is often overlooked. These similarities are discussed further in the next part of the exegesis.

But as Boulle points out, 'there are still important contrasts between mediation and litigation'.⁶⁰³ When it comes to the adjudicative aspects of litigation, there are 'degrees of formality, procedural technicality, transparency and finality not encountered in mediation'.⁶⁰⁴ For many parties, the fact that mediation produces 'consensual' outcomes rather than imposed ones will also be important. For other parties, the process used will be more important than the outcome achieved.⁶⁰⁵

It is my view that there are at least two additional differences between litigation and mediation – differences which are overlooked by proponents for new rules; differences which support the retention of general rules of conduct which give legal representatives some

⁶⁰⁰ Kovach, *New Wine Requires New Wineskins*, above n 6, 942; Shapira, above n 31, 249; Menkel-Meadow, above n 323, 30.

⁶⁰¹ Rosenberg, above n 330, 898.

⁶⁰² Boulle, above n 53, 131.

⁶⁰³ Boulle, above n 39, 145.

⁶⁰⁴ Ibid.

⁶⁰⁵ There is evidence that if the procedure is fair, people are more likely to perceive the outcome as fair: Welsh, *Perceptions of Fairness*, above n 385, 170.

discretion over matters such as candour and cooperation in mediation. The differences are that:

1. Although there is some uncertainty as to the balance to be struck between the objectives of case management and justice in an individual case, the features, objectives and values of litigation remain fairly consistent from one case to the next. Judges and legal practitioners must follow the same set of rules of procedure and laws of evidence (and abide by requisite standards of proof). They must apply the same rules of substantive law. On the other hand, mediation is an extremely diverse process which may take different forms and serve a range of different objectives and values. Each mediation will differ from the next.
2. The ethical expectations of judges in litigation do not vary.⁶⁰⁶ Macfarlane claims that, as compared to mediators, ‘judges or arbitrators, do not face the same scope of choice in ethical matters, as they are constrained by external rules and a journey towards a fixed end.’⁶⁰⁷ Mediation, in contrast, has ‘no fixed end point’.⁶⁰⁸ Codes of conduct for mediators leave mediators with wide discretion to make ethical judgments in the context of each mediation. ‘[T]he mediator is both more active and more complex a third-party neutral than the judge who is governed by the Judicial Code of Conduct.’⁶⁰⁹ Judges do not have the same potential as mediators to influence the course and outcome of proceedings. For all the recent reforms made to the civil justice system, judges are less influential and less activist than mediators.

In the next part of the exegesis, I critically analyze a number of proposals which have been made for new non-adversarial rules of conduct for lawyers representing parties in mediation and the reasons given for these proposals.

⁶⁰⁶ Different ethical considerations may arise when a judge acts as a mediator in Judicial Mediation. In particular, the issue of whether or not judges should see the parties separately is still open to debate: see the discussion above n 315.

⁶⁰⁷ MacFarlane, above n 31, 59.

⁶⁰⁸ Ibid 67.

⁶⁰⁹ Menkel-Meadow, above n 323, 43.

PART 4: PROPOSED NEW ETHICS RULES FOR MEDIATION

Several well-known authors have proposed changes to the ethical mandates for lawyers who represent parties in mediation.⁶¹⁰ Similar proposals have been made with respect to legal representatives in negotiation for well over thirty years.⁶¹¹ In the discussion which follows, I first examine and critique the rationale given for change and then, the content of a range of proposals for modification of the current rules of professional conduct.

4.1 Rationale for Change

The reasons given for the need to reform the current rules of professional conduct for legal representatives in negotiation and mediation varies between authors. Three separate approaches are evident in the literature. For the purpose of discussion, I have labelled these approaches as follows:

1. Negotiation is surrogate litigation.
2. Negotiation lacks due process controls.
3. Mediation is more than 'ordinary' negotiation.

Each of these approaches is critiqued in turn below.

Negotiation is surrogate litigation: Some commentators point to the *similarities* between the processes of negotiation and litigation and argue that the standards of conduct for lawyers in negotiation should be raised to the *same* level as that owed by lawyers to a *tribunal* in litigation.⁶¹² It is argued that although the style and procedural format of litigation distinguish it from the relatively informal nature of private settlement negotiation, the objectives and corresponding methodologies of the two processes are quite similar.⁶¹³ The processes have a shared purpose ie 'the fair and efficient resolution of disputes'.⁶¹⁴ Gordon goes so far as to assert that private settlement is 'in several respects surrogate litigation, mirroring in purpose, if not process, the trial it replaces'.⁶¹⁵ Gordon notes that lawyers in negotiation may offer

⁶¹⁰ Fairman, above n 9, 528; Kovach, *Plurality in Lawyering Roles*, above 9, 413-4; Bordone, above n 8, 3; Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 410.

⁶¹¹ Rubin, above n 422, 589; Murray L Schwartz, 'The Professionalism and Accountability of Lawyers' (1978) 66 *California Law Review* 669, 671; Robert Gordon, 'Private Settlement as Alternative Adjudication: A Rationale for Negotiation Ethics' (1984-1985) 18 *University of Michigan Journal of Law Reform* 503, 504.

⁶¹² Rosenberger, above n 273, 623-4; Schwartz, above n 611, 671; Dal Pont, above n 25, 43.

⁶¹³ Gordon, above n 611, 503-4.

⁶¹⁴ Gordon, above n 611, 504. Also see Rubin, above n 422, 589-90.

⁶¹⁵ Gordon, above n 611, 504.

versions of the facts in much the same way as witnesses would at trial.⁶¹⁶ They also bargain ‘in the shadow of the law’ with knowledge of their clients’ legal rights and obligations in mind. Gordon argues that, at least in as much as negotiation may determine substantive legal rights, the ethics of the process should safeguard the reliability of information provided so that negotiation produces ‘analogous outcomes’ to those which would be produced in litigation were those controversies to be formally litigated.⁶¹⁷

In like manner, some authors argue that mediation and litigation are similar. For example, Sabatino points to the existence in mediation of information exchange procedures and to the practice of mediators asking for issues papers and risk analysis documents from the parties.⁶¹⁸ He goes so far as to refer to ADR as ‘litigation lite’.⁶¹⁹ He observes:

In fact, the supposed dichotomy between what is collectively described these days as ‘ADR,’ on the one hand, and ‘traditional adjudication,’ on the other, actually is not as severe as it may appear on the surface. A close examination of the ADR programs connected with the federal and state courts, as well as ADR services offered in the private sphere, reveals that evidentiary and procedural norms underlying our traditional adjudicative system are substantially replicated in those alternative processes.⁶²⁰

Negotiation lacks due process controls: Some authors point to the *differences* between the processes of negotiation and litigation and rely on those differences to argue that lawyers in negotiation should owe *higher* standards of conduct than those that they owe to an *opponent* in litigation.⁶²¹ These authors point out that negotiation lacks a third party arbiter,⁶²² formal codified rules of procedure and evidence (including those which permit each party to test the veracity of the other party’s information), and the need to apply substantive rules.⁶²³ Negotiation is a ‘largely invisible, undocumented, and unreviewable’ process.⁶²⁴ Higher standards of conduct are needed, it is argued, in order to protect the integrity of the process.

⁶¹⁶ Ibid 515.

⁶¹⁷ Ibid 504, 516.

⁶¹⁸ Jack M Sabatino, ‘ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution’ (1998) 47 *Emory Law Journal* 1289, 1317-8, 1334.

⁶¹⁹ Ibid 1292. Sabatino’s article focuses primarily, but not exclusively, on arbitration.

⁶²⁰ Ibid 1291-2.

⁶²¹ Rosenberger, above n 273, 623-4; Schwartz, above n 611, 671; Dal Pont, above n 25, 43.

⁶²² Schwartz, above n 611, 671. Also see Dal Pont, above n 25, 43.

⁶²³ Schwartz, above n 611, 671; Rosenberger, above n 273, 623-4; Bush, *Ethical Standards in Mediation*, above n 2, 254. Also see Mary Jo Eyster, ‘Clinical Teaching, Ethical Negotiation, and Moral Judgment’ (1996) 75 *Nebraska Law Review* 752, 763.

⁶²⁴ Eyster, above n 623, 762.

These arguments might also be applied to mediation, which like negotiation, lacks due process controls.

It should be noted that authors in this second group recommend adoption of much the same standards of conduct as those in the first group – they simply start from a lower reference point ie duties owed to an opponent in litigation as opposed to duties owed to the tribunal in litigation. A lawyer in litigation owes higher duties to the tribunal than those that he or she owes to an opponent.

Mediation is more than 'ordinary' negotiation: Despite widespread acceptance of mediation as a process of assisted negotiation, some authors assert that standards of conduct in unassisted negotiation do not, by extension, become acceptable in mediation. They argue further that *higher* standards should apply in mediation (and problem-solving negotiation) than those that govern conduct in ordinary negotiation and litigation.⁶²⁵ As to why mediation requires higher standards, a number of overlapping reasons are given. It is said that the general rules of conduct which apply to litigation (and negotiation) were fashioned with adversarial litigation in mind⁶²⁶ and that they are inappropriate for, and incompatible with, mediation⁶²⁷ - a process which, say the critics, is based on *values and goals* which are fundamentally different from those of litigation.⁶²⁸ A related argument is that legal representatives perform different *roles* in ADR from traditional adversary practice⁶²⁹ - roles that '*are sufficiently different and complex to require their own "rules"*'.⁶³⁰

The discussion which follows examines the assumptions underlying each approach.

⁶²⁵ Kovach, *Ethics for Whom?*, above n 28, 57, 61; Shapira, above n 31, 264; Kovach, *New Wine Requires New Wineskins*, above n 6, 952. Also see Menkel-Meadow who points out that '[t]he question of whether mediation, which is facilitated negotiation, and "unassisted" negotiation can have different ethical rules and practices is quite complex': Carrie Menkel-Meadow, 'Ethics, Morality and Professional Responsibility in Negotiation' in Bernard and Garth, above n 3, 119, 122, footnote 13.

⁶²⁶ Bordone, above n 8, 3; Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 410; Kovach, *Good Faith in Mediation*, above n 8, 619.

⁶²⁷ Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 410; Fairman, above n 9, 528; Kovach, *Plurality in Lawyering Roles*, above 9, 413-4; Kovach, *Good Faith in Mediation*, above 8, 620; Menkel-Meadow, above n 9, 106.

⁶²⁸ Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 430, 453-4.

⁶²⁹ Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 409; Kovach, *Ethics for Whom?*, above n 28, 61.

⁶³⁰ Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 409 (emphasis in original).

4.1.1 Assumption: Negotiation is Similar to Litigation

Gordon is correct in asserting that litigation and negotiation have a shared purpose, as indeed do litigation and mediation (ie the peaceful resolution of disputes) but both he and Sabatino overstate the case for procedural similarities between litigation on the one hand and negotiation and mediation on the other. Negotiation (both unassisted and assisted) may take a variety of forms. It might be formal and ‘litigation like’; or it might be very informal and bear no resemblance to litigation, even when it involves legal matters. It might also be argued that parties enter into negotiation because they do not want to end up with outcomes that are analogous to those which might be produced by a court.

4.1.2 Assumption: Negotiation is Different from Litigation

Negotiation does lack due process controls. While the arguments made by proponents of the second approach at least remain fairly true for all negotiations (unlike those of the ‘negotiation is surrogate litigation’ approach), there are a number of arguments which can be made against the introduction of more formal rules regulating conduct in negotiation (these arguments apply regardless of which of the three approaches is relied upon). The introduction of more rules would lead to formality and inflexibility.⁶³¹ Many disputants choose negotiation because of its informality and flexibility ie because of the absence of rules. Many disputants choose it because it is a private process and the content and outcome can remain confidential. These features of negotiation make its regulation problematic, so much so that some authors claim that the process has to be ‘almost entirely self-regulated’ as a practical matter.⁶³² ‘The informality, flexibility, and freedom of the process are attributes that many cite as essential to the continued success and viability of the process.’⁶³³ All of these arguments apply equally well to mediation. They are explored in further detail later in this part of the exegesis in the context of specific proposals for reform.

⁶³¹ Reed Elizabeth Loder, ‘Tighter Rules of Professional Conduct: Saltwater for Thirst?’ (1987-1988) 1 *Georgetown Journal of Legal Ethics* 311, 319.

⁶³² Norton, above n 161, 529.

⁶³³ Eyster, above n 623, 777; Norton, above n 161, 506.

4.1.3 Assumption: The Rules of Professional Conduct Reflect an Adversarial Paradigm of Legal Practice

The first claim or assumption made by proponents of the ‘mediation is more than ordinary negotiation’ approach is that the professional conduct rules were fashioned with adversarial litigation in mind.⁶³⁴ In fact, historical accounts of the development of the rules of conduct do not support this conclusion.⁶³⁵

As to the current rules, some authors reject the notion that professional regulation is based entirely on adversarial notions.⁶³⁶ For instance, Schneyer points to recent ethics opinions given in the US on the practice of collaborative law and argues that they provide ‘strong evidence that the mainstream bar does not understand the prevailing rules of legal ethics to be grounded in an “adversarial” paradigm today, *if they ever were*’.⁶³⁷ At most, ‘the prevailing rules may give undue attention to litigation ethics’.⁶³⁸ However, even this criticism may not be warranted. It seems that the drafters of the rules had a choice. They could devise a set of rules which dealt with lawyering activities according to the tasks involved eg advising, counselling, interviewing, drafting (various types of letters, opinions, contracts, etc), negotiating (in various settings), advocating (in various settings including litigation) and so on. Alternatively, they could draft a set of rules which categorised lawyering activities according to the entity (person or institution) with whom the lawyer engages and owes duties eg the court, clients, other practitioners, third parties, and the public. This may not be an exhaustive account of the way in which lawyering activities can be ‘unbundled’⁶³⁹ but it appears that this later approach was chosen in Australian jurisdictions where the rules are divided into categories according to the entity with whom lawyers deal – the court, clients,

⁶³⁴ Bordone, above n 8, 3; Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 410; Kovach, *Good Faith in Mediation*, above 8, 619.

⁶³⁵ Generally on the evolution of the rules, see Dal Pont, above n 25, 17 for the position in Australia; Boon and Levin, above n 2, 6-7 on the position in the UK; and for a discussion of the position in the US, see Moore, above n 272, 926; Landsman, above n 60, 734; Edward L Wright, ‘The Code of Professional Responsibility: Its History and Objectives’ (1970-1971) 24 *Arkansas Law Review* 1; Schneyer, above n 276, 310; Ted Schneyer, ‘Moral Philosophy’s Standard Misconception of Legal Ethics’ (1984) *Wisconsin Law Review* 1529, 1531-2.

⁶³⁶ Schneyer, above n 276, 310; Schneyer, above n 635, 1531-2; Hazard, above n 120, 379; Fred Zacharias and Bruce Green, ‘Reconceptualizing Advocacy Ethics’ (2005-2006) 74 *George Washington Law Review* 1.

⁶³⁷ Schneyer, above n 276, 316.

⁶³⁸ Ibid footnote 130.

⁶³⁹ Forrest S Mosten, *Collaborative Divorce Handbook: Helping Families Without Going to Court* (Jossey-Bass, 2009) 59.

other practitioners and other third parties. A similar categorical framework underlies the ABA Model Rules.⁶⁴⁰ This may be the reason why there are no rules dedicated to negotiation.

The current formulation of the rules reflects, and flows naturally from, those beliefs or values which, according to many commentators, are fundamental to the legal profession. The most well known formulation of ‘fundamental professional values’ is that appearing in the MacCrate Report which lists the following as fundamental professional values:⁶⁴¹

- providing competent representation to clients - the responsibility to clients;
- striving to promote the administration of justice, fairness, and morality – the public responsibility to the justice system;
- maintaining and striving to improve the profession – the responsibility to the legal profession; and
- professional self-development – the responsibility to oneself.

These values underlie the professional conduct rules (and they are also captured in other parts of the law of lawyering). At present, some of these values are clearly captured in ‘rule’ format. For example, the value of responsibility to clients translates into a series of specific duties owed by lawyers to clients, including the duty to provide competent representation to clients and the duty to act with due diligence in carrying out clients’ instructions.⁶⁴² Until recently, the rules in Australian jurisdictions could justifiably be criticised for placing insufficient emphasis on the value of promoting the administration of justice. As mentioned

⁶⁴⁰ To a very limited extent, the ABA Rules adopt a mixed approach with r 2 dedicated to the lawyers’ role as counsellor within the framework of duties owed to a client.

⁶⁴¹ This formulation of values is drawn from the MacCrate Report, a major report on American law schools, which has been widely endorsed in Australian law schools: see American Bar Association, *Legal Education and Professional Development – An Educational Continuum: Report of The Task Force on Law Schools and the Profession: Narrowing the Gap* (Chicago, 1992) (*MacCrate Report*) 140-1; Robert MacCrate, ‘Keynote Address – The 21st Century Lawyer: Is There a Gap to be Narrowed?’ (1994) 69 *Washington Law Review* 517, 523. The same formulation can be found in the preamble of the ABA Model Rules of Professional Conduct. In fact, even the MacCrate Report has been criticised as being incomplete: see R G Pearce, ‘MacCrate’s Missed Opportunity: The MacCrate Report’s Failure to Advance Professional Values’ (2002-2003) 23 *Pace Law Review* 575, 579. A more recent formulation made by Stuckey and his associates identified five sets of professional values. In addition to the values mentioned in the MacCrate Report, Stuckey identifies as separate values: sensitivity and effectiveness with diverse clients and colleagues; and a nurturing quality of life: Stuckey et al, above n 57, 66-7. Also see James W Jones and Bayless Manning, ‘Getting at the Root of Core Values: A “Radical” Proposal to Extend the Model Rules to Changing Forms of Legal Practice’ (1999-2000) 84 *Minnesota Law Review* 1159 who identify and articulate core professional values of the legal profession from the perspectives of clients and that of society as a whole. For a general discussion of fundamental professional and personal values, see Wolski, above n 15, 28-32.

⁶⁴² Wolski, above n 15, 30-32.

in part 2, the draft new rules remedy this defect by explicitly providing that lawyers owe a paramount duty to the administration of justice.⁶⁴³

To the extent that the rules might reflect an adversarial paradigm, they do not exclude non-adversarial practice even in the context of litigation. The rules do not demand combativeness and aggression as prerequisites to effective adversarial litigation. '[O]ur adversary system considers that litigation is not a street-fight. On the contrary, the system involves a complicated cooperative interaction between contending advocates'.⁶⁴⁴ The rules certainly do not prohibit cooperation between 'opponents' in negotiation.

4.1.4 Assumption: Mediation is Based on Values and Objectives Fundamentally Different from Those of Litigation

The next claim made by proponents for new rules ie that the values and objectives of mediation are fundamentally different from those of litigation, also cannot be supported, for at least two reasons. First, some authors in this area compare the values of mediation with the values of client representation in litigation. It is submitted that these are inappropriate points of comparison. One such author is Menkel-Meadow who compares the values of trust, confidentiality, creativity and openness (for mediation) with the values of zeal, client loyalty, partisanship and non-accountability.⁶⁴⁵ This last set of values (ie those of zeal, client loyalty, partisanship and non-accountability) are not the values of litigation (arguably, they are not even the values of representation in litigation). Additionally, some of the values that Menkel-Meadow claims for mediation eg openness and creativity, are arguably not values in the sense of important beliefs but rather (idealised) structural features of the mediation process.

Second, the processes of litigation and mediation have more in common than is commonly thought. As Gordon argues with respect to litigation and negotiation, at the most basic and abstract level, the primary objective of these processes is peaceful dispute resolution and decision-making.⁶⁴⁶ Even at a less abstract level, the processes have much in

⁶⁴³ Draft Solicitors' Rules 2010 r 3.1. The provisions in the draft Barristers' Rules are less direct but still emphasise that the paramount duty is to the administration of justice, see rr 5, 12.

⁶⁴⁴ Hazard, above n 120, 380.

⁶⁴⁵ Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 430, 453-4.

⁶⁴⁶ Bordone, above n 8, 6. At a very abstract level, all dispute resolution processes share a common set of values. Such processes value conflict itself; the early expression of conflict; the peaceful expression of conflict; and the

common. The objectives articulated by the ALRC (with respect to the Australian federal system of civil litigation) and NADRAC (with respect to ADR in Australia) overlap to a significant degree. The ALRC called for a litigation system which is ‘just, accessible, efficient, timely and effective’.⁶⁴⁷ NADRAC considered that certain core objectives of ADR could be identified (despite the differences in perspective of the various stakeholders) ie: to resolve disputes, using a process considered by the parties to be fair, which achieves acceptable lasting outcomes, and uses resources effectively.⁶⁴⁸ Certain values underlie and inform these objectives, in both litigation and mediation. For example, the values underlying ‘fair’ dispute resolution include human dignity, personal autonomy, self-determination, party participation and control.⁶⁴⁹ Sherman noticed this similarity between litigation and mediation, claiming that:

our litigation system and ADR have a great deal in common – indeed, they are but different points along a spectrum of dispute-resolution processes. Both place a high value on a rational approach to dispute resolution, fairness of process, and the centrality of party autonomy.⁶⁵⁰

Mediation enthusiasts (and litigation detractors) might argue that litigation does not honour values such as self-determination, party autonomy and party control. These are the values that are usually claimed for mediation. They are claimed for mediation because parties have control over the decision in mediation whilst they do not in litigation. However, this presupposes that parties value highly those processes which allow them to control the outcome. The practice of distinguishing among dispute resolution processes on the basis of ‘the locus of decision control may be misguided’.⁶⁵¹ There is evidence that ‘disputants care as much or more about the procedural justice offered by dispute resolution processes than about

voluntary resolution of conflict: Raymond Shonholtz, ‘The Promise of Conflict Resolution as a Social Movement’ (1989-1990) 3 *Journal of Contemporary Legal Issues* 59, 68, 69.

⁶⁴⁷ ALRC IP 20, above n 329, [3.9]-[3.17].

⁶⁴⁸ NADRAC, *A Framework for ADR Standards Report*, above n 378, 13.

⁶⁴⁹ Sward, above n 60, 317-9; Kovach, *New Wine Requires New Wineskins*, above n 6, 951-2; Israel, above n 291, 6; Bush, above n 327, 4; Welsh, *Perceptions of Fairness*, above n 385, 170.

⁶⁵⁰ Edward F Sherman, ‘Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?’ (1992-1993) 46 *South Western University Law Review* 2079, 2082-3. Sherman concedes that there are procedural difference between a trial and ADR. His basic argument is that integration of ADR within the court system need not compromise the values and objectives of ADR ‘if its distinctive process is understood and respected’: 2084.

⁶⁵¹ Nancy A Welsh, ‘Disputants’ Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice’ [2002] *Journal of Dispute Resolution* 179, 184.

decision control'.⁶⁵² '[T]he procedural justice literature demonstrates that, regardless of their decision control, disputants consistently value processes that feel fair because they offer a meaningful opportunity for voice and consideration and assure even-handed, dignified treatment.'⁶⁵³

It should come as no surprise that litigation and mediation as practised in the West serve similar objectives and reflect similar values. Each is a product of Western culture.⁶⁵⁴ The connection between culture, society and dispute resolution is more openly acknowledged in the case of litigation. It has been said, for instance, that personal autonomy and individual liberty 'crystallized in the adversary system'.⁶⁵⁵ We are less open about, and cognizant of, the fact that mediation, as practised in the West, also reflects values such as individualism (and all of its associated tenets such as the concepts of free choice, self-definition, self-fulfilment and self-realisation).⁶⁵⁶

As illustrated in part 3, the values of a process can be articulated with more specificity and when this is done, it may be the case that adjudication places less emphasis on some values than others eg it has been claimed that adjudication treats recognition by the parties as

⁶⁵² Ibid. Also see Jill Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9 *Murdoch University Electronic Journal of Law* available at <http://www.murdoch.edu.au/elaw/issues/v9n2/howieson> [19].

⁶⁵³ Welsh, above n 651, 180. Welsh notes that in contrast to outcome fairness, there is 'striking consistency in the criteria that people use to judge whether a dispute resolution or decision-making process was fair': *Perceptions of Fairness*, above n 385, 169. She identifies four particular process elements that heighten perceptions of procedural justice: 'the opportunity for disputants to express their "voice," assurance that a third party considered what they said, and treatment that is both even-handed and dignified': Welsh, above n 651, 185 (citations omitted). For more on criteria for procedural justice, see Sourdin, above n 377, 20-1. Also see Shapira, above n 31, 254; Nolan-Haley, above n 6, 1375; Jean R Sternlight, 'ADR is Here: Preliminary Reflections on Where It Fits In A System of Justice' (2002-2003) 3 *Nevada Law Journal* 289, 298.

⁶⁵⁴ Mediation is often promoted in Western cultures as a unique and relatively recent innovation. It is not. It has been the dominant mode of dispute resolution in China and other pre-industrialised traditional societies for centuries. In collectivistic cultures, mediation is used as a way to promote social harmony, balance and reconciliation. The interests, preferences, views and goals of the individual are subsumed in those of the larger self ie the group. See Wolski, above n 41; N T Feather, 'Value Systems Across Cultures: Australia and China' (1986) 21 *International Journal of Psychology* 697, 700; Sternlight, above n 653, 298.

⁶⁵⁵ Riskin, above n 333, 30. Also see Menkel-Meadow, above n 323, 29.

⁶⁵⁶ Feather, above n 654, 711; Bush, above n 327, 17; Warren Pengilly, 'Alternative Dispute Resolution: The Philosophy and the Need' (1990) 1 *Australian Dispute Resolution Journal* 81, 85; Bush and Folger, above n 59, 239-41. Also see Riskin, above n 333, who notes that the Confucian ideal of harmony 'contrasts sharply with the predominant Western perspectives which focuses on freedom as an absence of restraint and on autonomy and individual liberty as the highest goal': 30. More generally, see Gold, above n 385. Also see Boulle who notes that mediation in the Australian context places value on individualism and a rational approach to decision-making: Boulle, above n 39, 85-6.

irrelevant.⁶⁵⁷ What is overlooked by authors who favour this third approach is that some models of mediation also treat recognition by the parties as irrelevant.

4.1.5 Assumption: Legal Representatives Undertake Different Roles in Mediation

Proponents of the ‘mediation is more than ordinary negotiation’ approach also claim that legal representatives perform different roles in ADR from those that they undertake in traditional adversary practice.⁶⁵⁸ Proponents of this approach have no problem with the lawyer’s role as adviser, counsellor and negotiator. Their real argument is that advocacy is inappropriate in mediation. This topic is explored in more detail in the context of specific proposals for change, commencing below.

4.2 Content of Proposals for New Rules of Professional Conduct

The content of the proposals for change to the professional conduct rules for mediation (and for negotiation) also varies between authors. However, some common themes emerge. ‘The exact changes that each [author] would propose to adopt varies, but the common underlying thread rests upon the belief that a form of good faith and fair dealing obligation needs to be imposed in order to insure that attorneys engage in negotiations ethically.’⁶⁵⁹ Another common theme, perhaps encompassed in the notions of good faith and fairness, relates to the need for candour. Each of these themes is discussed in turn below.

4.2.1 Proposals for Higher Standards of Disclosure

Several authors suggest the implementation of new rules (or the modification of the current ones) which would impose a significantly higher duty of disclosure on legal representatives in negotiation and mediation than is currently owed by them. However, there are wide ranging views on what is an appropriate level of disclosure.

⁶⁵⁷ Bush, *Ethical Standards in Mediation*, above n 2, 271.

⁶⁵⁸ Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 409; Kovach, *Ethics for Whom?*, above n 28, 61.

⁶⁵⁹ Rosenberger, above n 273, 618 (citations omitted).

As long ago as 1975, Rubin argued that lawyers in negotiations ‘must act honestly and in good faith’.⁶⁶⁰ He did not elaborate on what he meant by acting ‘honestly’. Peters argues that all deception in negotiations should be prohibited.⁶⁶¹ Stated positively, lawyers would be required to disclose all facts known to them and known to be important to their counterpart.⁶⁶² It is unclear whether Rubin and Peters intended that lawyers should also disclose relevant legal authorities and legislative provisions.

Menkel Meadow proposes that rule 4.1 (which deals with honesty to third parties) and by implication, rule 3.3 (which deals with candour to a tribunal) of the ABA Model Rules be amended.⁶⁶³ In her view:

1. ‘Lawyers should not misrepresent to or conceal from another person, a relevant fact or legal principle (including opposing counsel, parties, judicial officers, third party neutrals or other individuals who might rely on such statements)’.⁶⁶⁴
2. ‘Lawyers should not intentionally or recklessly deceive another or refuse to answer material and relevant questions in representing clients’.

If Menkel-Meadow’s suggestions were adopted, lawyers would have a positive duty to disclose relevant facts and law to an opponent, to a mediator and to a judge.⁶⁶⁵ There would be no safety in silence, and deflection or outright refusal to answer relevant questions would not be permitted.

Less radical suggestions are made by Alfini, who would omit the word ‘material’ from rule 4.1, forbidding lawyers from making any false statement of fact or law to a third person (a party or a mediator)⁶⁶⁶ and Peters who suggests that rule 4.1 be amended so as to prohibit

⁶⁶⁰ Rubin, above n 422, 589. Also see Gordon, above n 611, 530.

⁶⁶¹ Geoffrey M Peters, ‘The Use of Lies in Negotiation’ (1987) 48 *Ohio State Law Journal* 1, 4, 49.

⁶⁶² Ibid 50.

⁶⁶³ Her proposed rules are contained in what she calls, ‘The Ten Commandments of Appropriate Dispute Resolution: An Aspirational Code’, see Menkel-Meadow, *Non-Adversarial Lawyering*, above n 2, 167-8. These ‘rules’ are numbered 4 and 5 respectively on the list formulated by Menkel-Meadow.

⁶⁶⁴ Menkel-Meadow, *Non-Adversarial Lawyering*, above n 2, 167-8.

⁶⁶⁵ Currently, r 3.3(a)(1) of the ABA Model Rules does not require practitioners to reveal adverse facts to a tribunal.

⁶⁶⁶ Alfini, above n 6, 270. Also see Bordone, above n 8, 30 (who suggests a similar mandatory ethical guideline for negotiation). Lakhani also recommends removing the reference to ‘material’ so that there is an obligation to disclose ‘all facts (and law if relevant)’ which might aid in resolving the dispute to everyone’s satisfaction: Avnita Lakhani, *Deception as a Legal Negotiation Strategy: A Cross-Jurisdictional, Multidisciplinary Analysis Towards an Integrated Policy Reforms Agenda* (PhD Thesis, Bond University, 2010) 341.

false statements about interests and priorities to another party or the mediator (Peters defines interests in such a way as to exclude value estimates and settlement intentions).⁶⁶⁷ Under both of these proposals, many forms of deception could still be practised including puffing, exaggeration and lying about willingness to settle. Neither proposal addresses instances of silence ie lawyers would still be permitted in most circumstances to choose not to disclose relevant information.

Sammon argues that the same duties of candour as apply ‘in court’ ought apply to a lawyer in mediation.⁶⁶⁸ Dal Pont argues that the standard of candour in negotiations ought not be lower than that imposed in court. He says, ‘[i]t is difficult to conclude that this standard ought to be diluted (or nullified) simply because the conduct or omission occurs outside the walls of the court’.⁶⁶⁹ But neither Sammon nor Dal Pont specify to whom the duty is owed ie to the mediator and the opponent or just the mediator, and neither is specific about the form the duty should take (bearing in mind that there are two different standards operating under the current rules: that owed to ‘the court’ and that owed to ‘other parties’ including opponents). They might assume that a mediator is to be afforded the same standard of candour as a tribunal but they do not clarify the matter.

Meyerson is more specific about the duty of candour owed to a mediator, asserting ‘that the same ethical obligations of candor that a lawyer owes to a judge are owed to a mediator’.⁶⁷⁰ Thus, a legal representative in mediation would be:

1. Prohibited from knowingly misleading the mediator on any matter.
2. Under an obligation to inform a mediator of any relevant binding authority and legislative provisions of which the lawyer is aware.⁶⁷¹

⁶⁶⁷ Peters, above n 6, 139. There has been much criticism of r 4.1 of the ABA Model Rules and many authors have suggested that it be changed. Bordone calls it a ‘euphemism for lying’: Bordone, above n 8, 13. Also see Christopher M Fairman, ‘Why We Still Need a Model Rule for Collaborative Law: A Reply to Professor Lande’ (2006-2007) 22 *Ohio State Journal on Dispute Resolution* 707, 716. On the other hand, some commentators assert that the exception allowed in r 4.1 is ‘actually quite narrow. It merely permits “puffing” and “embellishment” but no overt or subversive misstatements of true material fact’: Craver, above n 283, 345.

⁶⁶⁸ Sammon, above n 6, 195. Sammon says that this reform is necessary ‘in order to preserve the integrity of mediation’: 195.

⁶⁶⁹ Gino Dal Pont, ‘Are Ethical Principles Malleable in the Negotiation Environment?’ (2008) (September) *Law Society Journal* 42, 43.

⁶⁷⁰ Bruce E Meyerson, ‘Telling the Truth in Mediation: Mediator Owed Duty of Candor’ (1997-1998) 4 *Dispute Resolution Magazine* 17, 17. There is an inconsistency in Meyerson’s approach for he then bases his arguments on the requirements of r 4.1 of the ABA Model Rules (which governs candour to third persons) rather than r 3.1 which governs candour to a tribunal.

⁶⁷¹ See, eg, LCA Model Rules r 14.6; Barristers’ Rules r 25; ABA Model Rules r 3.3.

If I am correct in assuming that the reference to ‘mediations’ in the definition section of the rules in Australia refers to ‘mediators’, then this represents the position in Australia at the current time. Presumably the disclosures required under Meyerson’s proposal could be made in separate sessions with the mediator (a point on which Meyerson is silent), in the absence of the other party and under the cloak of confidentiality. There would be no obligation to reveal adverse facts to a mediator under this proposal (so long as non-disclosure was not tantamount to misleading or deceiving the mediator). Meyerson does not address the issue of the duty of candour owed to opponents.

4.2.2 Problems with Proposals for Higher Standards of Disclosure

There are a number of problems with proposals to raise the standard of disclosure owed by legal representatives in negotiation and mediation (quite apart from the fact that commentators seem unable to agree on the appropriate level of disclosure which should be owed).

The first problem is that deception commonly occurs within negotiation – indeed, it seems almost to be universally accepted that ‘some form of deceit, at least in the broadest sense of the word, is inherent in all negotiations’.⁶⁷² This fact does not mean that deception should be the norm. However, it seems, and here is the second problem with raising the bar, that some deception (such as deception over settlement points) is legitimate and even necessary in ‘many traditional modes of bargaining’.⁶⁷³ Rosenberger asserts that ‘it is unproductive to discuss a “utopian negotiation world” in which complete disclosure is the norm. Arguably, making negotiations objectively fair and requiring complete and honest disclosure would break down the very essence of the informal negotiation process.’⁶⁷⁴ Consequently, it is argued that Rubin’s ‘universalist’ standards⁶⁷⁵ of honesty and good faith are ‘so comprehensive that they do not differentiate venal conduct from other behavior that

⁶⁷² Walter W Steele Jr, ‘Deceptive Negotiating and High-Toned Morality’ (1986) 39 *Vanderbilt Law Review* 1387, 1399; Lakhani, above n 666, 145; Temkin, above n 236, 180, 182; Parke, above n 11, 221. Also see Robert J Condlin, ‘Bargaining with a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can’t All Just Get Along’ (2007-2008) 9 *Cardozo Journal of Conflict Resolution* 1, 73.

⁶⁷³ Norton, above n 161, 508; Steele, above n 672, 1399; Lakhani, above n 666, 145.

⁶⁷⁴ Rosenberger, above n 273, 626.

⁶⁷⁵ Universalism assumes that societal ethical norms (such as ‘honesty is the best policy’) can be made to fit ethics in bargaining, a view rejected by Norton, above n 161, 522-4. Even Rubin, who argues for ‘honesty’ notes that candour is not inconsistent with striking a deal on terms favourable to the client because, within limits, that is the purpose to be served by negotiation: Rubin, above n 422, 589.

may well be essential to bargaining⁶⁷⁶ such as the overstatement of bottom lines involved in making decisions on settlement points.⁶⁷⁷ The third problem has been mentioned previously - more rules might destroy the informal nature of negotiation.

But just as it is almost universally accepted that some deception does and should occur, it is also almost universally accepted that there ought to be some limits to deception in negotiation.⁶⁷⁸ The difficulty lies in deciding where the line should be drawn. Some realistic and practical suggestions have been made in this regard.

For example, Temkin argues that negotiators (whether in negotiation or mediation) ought not have to disclose everything. He maintains that there ought to be some definite limits on the duty of candour in mediation, what he calls a 'silent safe harbor'.

[A]bsent court rule, principle of substantive law, or prior factual representation, an attorney should have no duty to make affirmative factual representations in the course of settlement negotiations, subject only to the crime/fraud exception contained in the Model Rules. In short, there should be a silent safe harbor. An attorney who makes no representations (and does not condone or repeat those of a client) makes no misrepresentations. Once an attorney speaks, what is said should be truthful, consistent with the attorney's duty to preserve client secrets and confidences.⁶⁷⁹

In my opinion, this is an appropriate place at which to draw the line. It is the place at which the line has been drawn in the current rules in the US vis à vis mediators and opponents and in Australia, vis à vis opponents. As mentioned in part 2, while lawyers must refrain from certain misrepresentations, currently they are not subject to a duty of candour as regards their opponent; they do not have to correct an opponent when he or she is wrong and they do not have to help an opponent when he or she does not have the information they need. There currently exists a silent safe harbour. I agree with Temkin that it should remain safe. As I discuss in part 7, I recommend that the harbour be extended so that lawyers in Australia are also free from a duty of candour vis à vis mediators (or at the least, that the rules be amended to stipulate that all required disclosures may be made in separate sessions on a

⁶⁷⁶ Norton, above n 161, 514; White, above n 230, 929.

⁶⁷⁷ Norton, above n 161, 514.

⁶⁷⁸ White, above n 230, 928. White is often quoted as representing one extreme view in this regard - an 'anything goes' approach. He expressed the view that '[t]o conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation': White, above n 230, 928. White is not given credit for recognising that 'there are limits on acceptable deceptive behaviour in negotiation': 928.

⁶⁷⁹ For instance, see Temkin, above n 236, 181.

confidential basis). Without that safe harbour, there is no incentive for lawyers and clients to prepare for mediation. Lawyers must charge their clients for time spent in preparation. The lawyer who fully prepares (and charges his or her client accordingly) should not have to enlighten the lawyer who is under-prepared. If the system depended on each of us helping the other, eventually each would come to rely upon the other and neither would adequately prepare.

4.2.3 Proposals for a Good Faith Requirement

Some commentators have suggested that a good faith requirement ought to be imposed on parties and lawyers in mediation, despite the lack of clarity as to the meaning of the term. They argue that such a requirement will promote more constructive and meaningful participation in the mediation process.⁶⁸⁰

Rubin was an early proponent of a good faith standard in negotiation.⁶⁸¹ It is interesting that Rubin does not define good faith apart from stating that ‘all lawyers know that good faith requires conduct beyond simple honesty’.⁶⁸² A number of authors have reiterated Rubin’s arguments – for both negotiation,⁶⁸³ and for mediation.⁶⁸⁴ All authors have had difficulty defining the concept of ‘good faith’.

One of the most prolific authors on this issue is Kovach who calls for the implementation of rules requiring good faith participation ‘in each and every mediation, in every context’⁶⁸⁵ whether the mediation takes place by court referral, contract or self-referral.⁶⁸⁶ Kovach argues that such a requirement ought to be mandated and enforced ‘by legislation, court rule, rules of conduct for lawyers, or rules of practice in mediation’.⁶⁸⁷ In the terminology adopted in this

⁶⁸⁰ Generally see Kovach, *Good Faith in Mediation*, above 8, 598; Weston, above n 187, 630; NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, 34 [2.5.1].

⁶⁸¹ Rubin, above n 422, 589. Also see Gordon, above n 611, 530.

⁶⁸² Rubin, above n 422, 590. When Rubin spoke of good faith, it appears that he meant that lawyers could not seek or agree to unconscionable settlements: Condlin, above n 105, 77.

⁶⁸³ See, eg, Gordon who includes an obligation to participate in good faith as one element in a suggested ‘Model Rule of Settlement Negotiation Ethics’: Gordon, above n 611, 530.

⁶⁸⁴ Several authors are of the view that lawyers in mediation should ‘commit to a standard of fairness and good faith higher than the standard applied to “ordinary” direct negotiation’: Shapira, above n 31, 265-6 (citations omitted). Also see Kovach, *Good Faith in Mediation*, above 8, 616-8; Carter, above n 188, 372; Weston, above n 187, 630.

⁶⁸⁵ Kovach, *Good Faith in Mediation*, above 8, 616.

⁶⁸⁶ Ibid 617.

⁶⁸⁷ Ibid 618.

exegesis, Kovach argues that good faith participation should be required in both private and mandatory mediations.

Kovach offers a suggested 'Model Rule for Lawyers Requiring Good Faith Participation in the Mediation Process'⁶⁸⁸ that consists of an itemised list of behaviours which would constitute good faith. Such behaviour includes:⁶⁸⁹

- arriving at the mediation prepared (with a knowledge of the case including the facts and possible solutions);
- having all necessary decision makers present in person;
- 'coming to the mediation with an open mind';⁶⁹⁰
- 'demonstrating a willingness to listen and attempting to understand the other side',⁶⁹¹ and 'at the very least, not summarily and without consideration'⁶⁹² immediately rejecting what the other party has to say;
- 'taking into account the interests of the other parties';⁶⁹³
- having a willingness to discuss one's own position in detail, explaining the rationale for a particular offer or refusal of an offer;
- participating in meaningful discussions with the mediator and all other participants, and
- refraining from conveying information that is misleading or false.⁶⁹⁴

Other authors assert that it still makes more sense to 'focus on defining what is *inappropriate* behaviour by mediation participants'.⁶⁹⁵ For example, Carter suggests that conveying information that is misleading or false⁶⁹⁶ will constitute bad faith,⁶⁹⁷ as will use of

⁶⁸⁸ Generally see Kovach, *Good Faith in Mediation*, above 8, 617 and 622-623 for a suggested model rule for lawyers requiring (and specifying the elements of) good faith.

⁶⁸⁹ Kovach, *New Wine Requires New Wineskins*, above n 6, 963. Also see Weston, above n 187, 630, who endorses this proposal. For an outline of earlier literature on this issue, see McPheeters, above n 211, 391.

⁶⁹⁰ Kovach, *Good Faith in Mediation*, above 8, 616.

⁶⁹¹ Kovach, *New Wine Requires New Wineskins*, above n 6, 963.

⁶⁹² Kovach, *New Wine Requires New Wineskins*, above n 6, 964; McPheeters, above n 211, 391.

⁶⁹³ Kovach, *New Wine Requires New Wineskins*, above n 6, 963.

⁶⁹⁴ Ibid 622.

⁶⁹⁵ Carter, above n 188, 372.

⁶⁹⁶ Generally see Kovach, *Good Faith in Mediation*, above 8, 622.

⁶⁹⁷ Ibid 622.

mediation ‘primarily to gain strategic advantage in the litigation process.’⁶⁹⁸ However, even Carter concedes that such definitions are ‘subjective to the point of being amorphous’.⁶⁹⁹

In an attempt to avoid ‘subjective’ good faith requirements, Edward Sherman suggests the imposition of a standard of ‘minimal meaningful participation’ under which the parties would be required to provide the mediator and each other with a short statement about the issues in dispute, the party’s position with respect to those issues, the relief sought and any offers and counteroffers already made.⁷⁰⁰

NADRAC recently considered the question of the statutory imposition of conduct obligations on participants (parties, their representatives and ADR practitioners) in ADR processes.⁷⁰¹ NADRAC’s recommendations differed according to whether the process was mandatory or private.⁷⁰² NADRAC gave two reasons for differentiating between processes on this basis, the first of which is relevant in the context of the present discussion. It noted that ‘[p]ublic interests are invoked when a court or tribunal orders parties to undertake ADR – in particular, the need for parties to act in ways which facilitate, rather than undermine, the objectives sought to be achieved by the order.’⁷⁰³ NADRAC’s reasoning shows a tilting of the objectives of mandatory mediation towards those of efficiency and settlement favoured by the court.

NADRAC favours the implementation of more legislation at the federal level in Australia which imposes an obligation on participants to mediate in good faith for it recommended that ‘[w]here such a requirement does not already exist, legislation should be introduced which requires participants (disputants and their representatives) in mandatory ADR processes to

⁶⁹⁸ Carter, above n 188, 372.

⁶⁹⁹ Ibid.

⁷⁰⁰ Edward F Sherman, “‘Good Faith’ Participation in Mediation: Aspirational, Not Mandatory’ (1997-1998) 4 *Dispute Resolution Magazine* 14, 16.

⁷⁰¹ The Attorney-General’s reference to NADRAC focused on possible legislative reform of the federal civil justice system: NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, 34 [2.5].

⁷⁰² NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, 38 [2.6].

⁷⁰³ NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, 34 [2.5]. NADRAC also identified a second more practical reason for making the differentiation – since the Federal Attorney General’s reference to NADRAC was limited to ‘possible legislative reform of the federal civil justice system’, NADRAC reasoned that ‘[c]onsiderable constitutional implications would attend any attempt by the Commonwealth to impose conduct obligations on participants involved in private ADR processes.’: *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, 34 [2.5].

participate in those processes in good faith’.⁷⁰⁴ It further recommended that such legislation should define ‘good faith’ inclusively and ‘capture the concept of a genuine effort to abide by certain enumerated ADR principles’⁷⁰⁵ etched out in an earlier NADRAC publication.⁷⁰⁶ One such principle is that ‘people who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution’.⁷⁰⁷

NADRAC was of the view that

[p]articipants in private ADR processes should not be required, through legislation, to adhere to any prescribed conduct standard. Instead, consensual adherence to appropriate conduct standards in private ADR should be encouraged in other ways, such as through codes of conduct, industry standards, and community education.⁷⁰⁸

NADRAC appears to have had in mind standards for ADR practitioners, not standards for legal representatives.⁷⁰⁹

As discussed below, in stark contrast to the view taken by NADRAC, some authors consider the fact that mediation is court-ordered to be a reason for not imposing conduct obligations on the parties.

4.2.4 Problems with Proposals for a Good Faith Requirement

Commentators in Australia⁷¹⁰ and in the US⁷¹¹ have identified a series of problems with the imposition of a good faith requirement on participants in mediation.

⁷⁰⁴ NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, 38 [2.6.1]. Despite the recommendations made by NADRAC, its report does not constitute, in my view, a strong endorsement for the imposition of a good faith requirement. It did not reach a consensus view on a preferred formulation for a conduct obligation. ‘Ultimately, the majority view of NADRAC was *slightly in favour of* good faith’: *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, 34 [2.5.1] (emphasis added).

⁷⁰⁵ NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, 38 [2.6.2].

⁷⁰⁶ NADRAC, *National Principles for Resolution of Disputes*, Interim Report to the Attorney General (July 2010) 4. The final report, the *National Principles for Resolving Disputes and Supporting Guide*, Report to The Attorney General (April 2011) was delivered to the Attorney General on 29 April 2011.

⁷⁰⁷ NADRAC, *National Principles for Resolution of Disputes*, Interim Report to the Attorney General (July 2010) 4. The principle appears in Annexure A of the final report, the *National Principles for Resolving Disputes and Supporting Guide*, Report to The Attorney General (April 2011).

⁷⁰⁸ NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, 38 [2.6.4].

⁷⁰⁹ NADRAC, *The Resolve to Resolve Report*, above n 7, 94 [6.5]-[6.6].

The first problem is that we do not have a clear understanding of what good faith means or requires from a party or from his or her lawyer.⁷¹² As Lande notes ‘legal authorities establishing good-faith requirements and commentators’ proposals do not give clear guidance about what conduct is prohibited’.⁷¹³ Most articulated elements of good faith such as ‘coming to the mediation with an open mind’⁷¹⁴ and ‘attempting to understand the other side’, depend on an assessment of a person’s state of mind ie they are subjective and vague.⁷¹⁵ NADRAC’s proposal for an inclusive definition by reference to general principles such as that mentioned above does not clarify the concept. Boettger analyses each element of Kovach’s positive formulation of good faith, Carter’s attempt to provide a negative definition, and Sherman’s minimal meaningful participation proposal and dismisses them all for subjectivity, for failing to provide objective grounds for sanctions, and for failing to provide reliable guidelines for what is and what is not appropriate behaviour.⁷¹⁶

A good faith requirement cannot be imposed unless everyone is clear about what it means and requires. ‘Commentators agree that the definition of good faith needs to be clearly and objectively determinable so that everyone can know what conduct is considered bad faith.’⁷¹⁷ As a legal term and as a basis for sanctions, it ‘must be judicially-reviewable without increasing the danger of case-by-case definitions’.⁷¹⁸

⁷¹⁰ For submissions opposing further legislative action with regard to the imposition of conduct obligations, see *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, 32 [2.4.2] and Appendix 2.4. The submissions are divided into a number of categories pertaining to difficulties with definition, enforcement, detracting from the original benefits of ADR, threat to ADR practitioner impartiality and availability of other means for dealing with conduct. Also see Appendix 2.3 of the report for views supporting the statutory imposition of conduct obligations.

⁷¹¹ For negative views on good-faith requirements, see generally, Lande, above n 189, 73, footnote 10 for an extensive list of authorities. For a summary of Lande’s objections to the imposition of a good faith requirement, see John Lande, ‘Why a Good-Faith Requirement Is a Bad Idea for Mediation’ (2005) 23 *Alternatives to the High Cost of Litigation* 1.

⁷¹² Boettger, above n 199, 17; Lande, above n 189, 77.

⁷¹³ Lande, above n 189, 86.

⁷¹⁴ Kovach, *Good Faith in Mediation*, above 8, 616.

⁷¹⁵ Lande, above n 189, 87; Sherman, above n 700, 15; Kenneth L Bennight Jr, ‘Enforceable Good Faith Requirements in Mediation Would be Worse Than the Status Quo’ (1997-1998) 4 *Dispute Resolution Magazine* 2, 2.

⁷¹⁶ Boettger, above n 199, 20, 22, 25.

⁷¹⁷ Lande, above n 189, 86; Boettger, above n 199, 17.

⁷¹⁸ Boettger, above n 199, 17.

The uncertainty generated by the concept of good faith and the lack of a clear dividing line between acceptable and unacceptable behaviour, is evident in the words of one of the strongest proponents for good faith. According to Kovach:

Good faith would not obligate the parties to possess a sincere desire to resolve the matter, nor should it necessitate complete disclosure to the other participants or even the mediator. But information exchange is a vital part of mediation, so it is likely that an element of good faith would call for some sharing of information. The scope of information to be disclosed, however, would remain within the discretion of the participants. Honesty in terms of this information also should be a basic consideration in defining elements of a good faith mandate. Just 'being nice' also is not an element of good faith. One can be kind and cooperative, and yet do nothing to advance the ball in terms of resolution. ... Moving or changing an offer or demand also is not an essential element of good faith. In fact, consideration of good faith should not be based upon the content of the proposals.⁷¹⁹

The most that one can draw from the words of Kovach is that good faith requires some sharing of information, and that the information that is shared must be honestly given.

The second problem is the over-breadth of the bad-faith concept.⁷²⁰ The proposal from Kovach is so broad that it effectively would prohibit defensible behaviour in mediation such as withholding information justifying bargaining strategies⁷²¹ and shifting positions and introducing new demands as the mediator asks for additional information. These tactics are all integral parts of mediation. How then can these things be signs of bad faith? Boettger concludes that '[t]he only behaviour that could constitute an expression of bad faith in mediation is to send a representative without sufficient settlement authority'.⁷²² However as discussed immediately below, this element is itself problematic.

The next problem with the imposition of a good faith requirement is that of finding someone with authority to settle.⁷²³ Given that one of the primary objectives of most models of mediation is to devise creative solutions, it may be difficult to know ahead of time what a party (or a party's representative) will be required to agree to eg it may be difficult to foresee

⁷¹⁹ Kovach, *New Wine Requires New Wineskins*, above n 6, 962.

⁷²⁰ Lande, above n 189, 93-4.

⁷²¹ Ibid 95.

⁷²² Boettger, above n 199, 19-20.

⁷²³ Lande, above n 189, 94-5.

the need to issue or accept an apology (and difficult to know who that apology must come from or go to), in order to satisfy a party.⁷²⁴ The requirement to send someone with authority to settle may hinder rather than promote meaningful participation.

Another group of problems lies in the potential for the parties to abuse good faith requirements (they might just go through the motions with surface bargaining and pro forma compliance) and bad faith sanctions (they might make frivolous bad faith claims).⁷²⁵ Bennight argues that the ‘harm from increased “satellite” litigation would far outweigh any benefit that might be realized’ and would be ‘worse than the status quo’.⁷²⁶

The next problem has to do with the potential for inroads to be made into the confidentiality of mediation. If a good faith requirement is to be enforced and parties sanctioned for breach, someone (usually the mediator) must report on the behaviour of the parties. Weston suggests that a narrow confidentiality exception might be crafted to allow a mediator to report good-faith participation violations.⁷²⁷ However, even a narrow exception will result in a weakening of the confidentiality of mediation communications.⁷²⁸ The proponents for rules requiring higher standards of conduct in negotiation and mediation generally do not deal with issues such as the possible dismantling of the lawyer-client privilege⁷²⁹ or with the inroads which would be made into the privacy and confidentiality of processes designed to be private.⁷³⁰

Good faith requirements are also susceptible to abuse by mediators. Such requirements may give mediators too much authority over the parties and increase the risk of coercion and inappropriate mediator conduct.⁷³¹ Bennight argues that Kovach’s proposal ‘places

⁷²⁴ Boettger, above n 199, 23; Lande, above n 189, 95.

⁷²⁵ Lande, above n 189, 98-9.

⁷²⁶ Bennight, above n 715, 2.

⁷²⁷ Weston, above n 187, 638.

⁷²⁸ Boettger, above n 199, 28; Lande, above n 189, 102-5; Sherman, above n 700, 15.

⁷²⁹ Scott S Dahl, ‘Ethics on the Table: Stretching the Truth in Negotiations’ (1988-1989) 8 *Review of Litigation* 173, 198.

⁷³⁰ See discussion by NADRAC, *The Resolve to Resolve Report*, above n 7, 171.

⁷³¹ Lande, above n 189, 106; Boettger, above n 199, 26.

frightening power in the mediator's hands'.⁷³² The risk of inappropriate mediator intervention is heightened in mandatory mediation programs.⁷³³

A good faith requirement might negatively impact on the principle of self-determination, particularly where mediation is mandated. Although NADRAC specifically recommended the use of good faith provisions in 'mandated' contexts, other authors argue that this is precisely the circumstances in which good faith participation should not be required. For instance, Sherman claims that in private mediations, 'the parties are free to agree to reasonable participation requirements that would be enforceable by an action for breach of contract'.⁷³⁴ He continues:

[b]ut where the mediation is ordered by a court, participation requirements should not unduly interfere with the parties' choice as to such forms of participation, how to present and argue their case, what information to reveal, whether to make offers or counteroffers and whether to settle.⁷³⁵

Sherman further asserts that '[a] requirement of "good faith" participation, which is inherently vague and subjective, unduly entrenches on the voluntariness of settlement and on the parties' legitimate right to demand their day in court.' In short, he concludes that such a requirement is inconsistent with the objectives of mediation.⁷³⁶ Similarly, Boettger believes that a good faith requirement in mandatory mediation would further deplete the parties' self-determination.⁷³⁷

In reality, it may be that we are not all entitled to our day in court - at least, not since the reforms to the civil justice system and the evolution of case management principles. However, Boettger may be correct in claiming, at the least, that a good-faith requirement overemphasizes the objective of efficiency and furthers the institutionalization of mediation.⁷³⁸

⁷³² Bennight, above n 715, 2.

⁷³³ Boettger thought a good-faith requirement in mandatory mediation would further deplete the parties' self-determination: Boettger, above n 199, 12. His view contrasts sharply with that taken by NADRAC, *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, 38 [2.6.1]-[2.6.2].

⁷³⁴ Sherman, above n 700, 14. He expresses doubt about Kovach's suggestion 'that participation requirements can or should be imposed on non-court ordered mediations through court or other rules': Sherman, above n 700, 16, footnote 1.

⁷³⁵ Sherman, above n 700, 14.

⁷³⁶ Ibid.

⁷³⁷ Boettger, above n 199, 12.

⁷³⁸ Ibid 8-12.

Finally, even assuming that the problems with respect to confidentiality can be outcome, good faith participation may be difficult to enforce and bad faith participation may be difficult to identify⁷³⁹ and sanction (a problem for which proponents for new rules generally do not offer a solution).⁷⁴⁰ In private mediations, there is little possibility of enforcement and effective sanction as the mediator has no authority to issue orders. In mandatory mediations, the court may take non-compliance into account in exercising discretionary power (such as discretion to award costs or to impose an adverse costs order) but it can do little else. In both private and mandatory mediations, it is difficult to assess the damages that might have resulted from alleged 'bad faith'.⁷⁴¹ The whole concept of sanctioning for bad faith may in the end be a little silly - it may lead to the absurd situation where both parties allege bad faith and the court has to decide who acted in 'worse faith'.⁷⁴²

On the subject of good faith participation, Boettger concludes that 'the absence of a litigation-proof definition for good faith, the problem of determining appropriate sanctions, and the serious damage to mediation's confidentiality' make it difficult to prove that a good faith requirement is beneficial.⁷⁴³ In a court related context, Lande concludes that the imposition of a good-faith requirement is 'likely to be ineffective and counterproductive in ensuring the integrity of court-connected mediation programs'.⁷⁴⁴ A good faith requirement does not convince the parties to engage meaningfully in the mediation process.

Before leaving the subject of good faith participation, it has been suggested that 'good faith' in mediation, from the lawyer's perspective, might include an additional obligation of 'allowing the client to discuss the matter directly with the other side and with the

⁷³⁹ McDougall, above n 187, 7.

⁷⁴⁰ Dahl, above n 729, 198. Also see *Hopeshore Pty Limited v Melroad Equipment Pty Limited* [2004] FCA 1445 (9 November 2004) where the court concluded that a legal representative had acted in a way that was calculated to defer a court ordered mediation. There, the court took the conduct of the legal practitioner into account in determining whether or not to exercise discretion in favour of that practitioner's client in an application for security for payment of costs (the court dismissed the client's motion) [39]. The court observed that: '[f]ew meaningful sanctions are available to a court where it does not receive the co-operation to which it is entitled from legal practitioners': [38].

⁷⁴¹ McDougall, above n 187, 7. There is disagreement over the appropriate sanctions for an act of bad faith: see, eg, Carter, above n 188, 390; McDougall, above n 187, 7; Sherman, above n 700, 16.

⁷⁴² Boettger, above n 199, 32.

⁷⁴³ Ibid 42.

⁷⁴⁴ Lande, above n 189, 75.

mediator’.⁷⁴⁵ This argument illustrates one of the problems with imposing detailed regulatory frameworks on participant conduct in mediation (a matter which is discussed in more detail in part 5). There is a need for flexibility in mediation. In almost all cases, a client should be able to discuss an issue directly with the other side and with the mediator should the client be willing and able to do so. But clients are not always willing to play an active role in mediation, at least not initially. Additionally, there may be rare occasions when it is not in the best interests of the client for the client to speak freely.⁷⁴⁶ There are occasions when it is more appropriate for a lawyer to speak on behalf of his or her client, a fact acknowledged by the *LCA Guidelines for Lawyers in Mediations*. Guideline 1 describes the role of lawyers in mediation. It states that the role will vary ‘from merely advising the client before the mediation, to representing the client during the mediation and *undertaking all communications on behalf of the client*’ (emphasis added).⁷⁴⁷

4.2.5 Proposals with Respect to Fairness and Cooperation

The matter of fairness in negotiation was addressed many years ago by Schwartz and Rubin. Schwartz opined that lawyers in negotiation should refrain from assisting a client by ‘unconscionable’ means and from aiming to achieve ‘unconscionable’ ends.⁷⁴⁸ Rubin also argued that ‘[t]he lawyer may not accept a result that is unconscionably unfair to the other party’.⁷⁴⁹ Rubin reasoned that a lawyer owes a duty of fairness to the profession and to society such that he ought not be free to negotiate an unconscionable result with his

⁷⁴⁵ Kovach, *New Wine Requires New Wineskins*, above n 6, 664; Kovach, *Good Faith in Mediation*, above 8, 615. Parker and Evans agree that the parties should be allowed to participate directly in the process: Parker and Evans, above n 17, 135.

⁷⁴⁶ Lawyers have been criticised for being reluctant to allow direct involvement by the parties in mediation. There may be some evidence to support the criticism but it is too early to draw conclusions. Research undertaken by Rundle, based on a sample of 42 legal practitioners involved in court connected mediations (mostly of personal injuries matters) in the Supreme Court of Tasmania between April 2006 and May 2007, showed that the majority of practitioners interviewed ‘did not support *uncontrolled* disputant participation’ (emphasis added): Olivia Rundle, ‘Barking Dogs: Lawyer Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases’ (2008) 8 *Queensland University of Technology Law and Justice Journal* 77, 83. Three of the practitioners interviewed were concerned that their clients might reveal something that the lawyer believed ought not to be revealed: 82. Interestingly, only one practitioner recommended that the client not speak: 82. I cannot say that the practitioners were incorrect in the way they approached the mediations. There may well be circumstances in which clients should be ‘restrained’. Rundle herself asserts that ‘[i]f they want to participate, *that preference should be supported*. On the other hand, disputants who prefer that another person speaks on their behalf should be granted that opportunity’ (emphasis added): 80. I endorse the wording that Rundle has chosen to use.

⁷⁴⁷ LCA, *Guidelines for Lawyers in Mediation* (at March 2007) s 1.

⁷⁴⁸ Schwartz, above n 611, 671.

⁷⁴⁹ Rubin, above n 422, 591.

opponent.⁷⁵⁰ This duty, in Rubin's view, 'must supersede any duty owed to the client'.⁷⁵¹ Rubin accepts that 'some difficulty in line-drawing is inevitable' but believes that 'there must be a point at which the lawyer cannot ethically accept an arrangement that is completely unfair to the other side'.⁷⁵² Both Schwartz and Rubin define 'unconscionable' by drawing its meaning largely from the substantive law of rescission, reformation and torts.⁷⁵³

Menkel-Meadow suggests that lawyers in ADR should be subject to the following two commandments touching on fairness:⁷⁵⁴

1. 'Lawyers as representatives should not agree to a resolution of a problem or participation in a transaction that they have reason to know will cause substantial injustice to the other party. In essence, a lawyer should do no harm'.
2. 'Lawyers should treat all parties to a legal matter as they would wish to be treated themselves and should consider the effects of what they accomplish for their clients. In essence, lawyers should respect a lawyer's golden rule'.

Steele goes well beyond the general law in proposing a codification of a fairness standard (and one which calls for cooperation) in negotiation in the following terms:

When serving as an advocate in court a lawyer must work to achieve the most favorable outcome for his client consistent with the law and the admissible evidence. However, when serving as a negotiator lawyers should strive for a result that is objectively fair. Principled negotiation between lawyers on behalf of clients should be a cooperative process, not an adversarial process. Consequently, whenever two or more lawyers are negotiating on behalf of clients, each lawyer owes the other an obligation of total candor and total cooperation to the extent required to insure that the result is fair.⁷⁵⁵

⁷⁵⁰ Ibid 591-2.

⁷⁵¹ Ibid 592.

⁷⁵² Ibid 591.

⁷⁵³ Schwartz argues that the lawyer in negotiation (what he calls the 'nonadvocate') 'should be held morally accountable for assistance rendered the client even though the lawyer is neither legally nor professionally accountable': Schwartz, above n 611, 671.

⁷⁵⁴ These are part of Menkel-Meadow's 'The Ten Commandments of Appropriate Dispute Resolution: An Aspirational Code'. These 'rules' are numbered 6 and 10 respectively on the list formulated by Menkel-Meadow, *Non-Adversarial Lawyering*, above n 2, 167-8.

⁷⁵⁵ Steele, above n 672, 1403.

As mentioned in part 2, in some circumstances lawyers must think beyond the interests of their clients. For instance, family law practitioners are obligated by legislation to have regard to the interests of children. There are also some commentators, such as Hobbs, who argue that in family law matters at least, a lawyer should take into account the interests of other affected parties (eg grandparents and children) and society, in addition to those of the client.⁷⁵⁶

Concern for the ‘fairness’ of an agreement and the interests of third parties lead Rutherford to argue that a legal representative should play a neutral non-adversarial role in mediation, providing advice to his or her client to help ensure the mediated agreement is fair rather than attempting to help the client obtain an advantage over the opposing party.⁷⁵⁷ Rutherford asserts that a legal representative’s role is to facilitate achievement of a fair agreement. He rejects notions of advocacy in mediation. ‘For mediation to succeed as a profession and to reach its highest objectives, advocacy has no place in any part of the process. For outside counsel to advocate a client’s interests contradicts the very essence of mediation and can produce inequitable results’.⁷⁵⁸

4.2.6 Problems with Proposals for a Fairness Rule and Rules Mandating Cooperation

In part 2, I noted that although the professional conduct rules require lawyers to act with ‘fairness’ in their dealings with others, they do not offer any specific guidance in relation to fair process, at least, not in relation to mediation. This is appropriate in the context of mediation for the parameters of procedural fairness are laid down by the mediator and agreed to by the parties. He or she will usually set out at least two behavioural guidelines, namely, that the parties (including their lawyers) not interrupt each other and that they not denigrate or threaten each other.⁷⁵⁹ He or she will expect (and might indeed list as a separate requirement) that the parties be civil and courteous to each other. The mediator is responsible for ensuring that the participants comply with these procedural guidelines.⁷⁶⁰ Mediators have

⁷⁵⁶ Hobbs, above n 574, 339. Also see Susskind, *Environmental Mediation*, above n 574, 4-6.

⁷⁵⁷ Mark C Rutherford, ‘Lawyers and Divorce Mediation’ (1986) *Mediation Quarterly* 17, 27-31. See discussion of this view by Jean R Sternlight, ‘Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting’ (1998-1999) 14 *Ohio State Journal on Dispute Resolution* 269, 280.

⁷⁵⁸ Mark C Rutherford, ‘Lawyers and Divorce Mediation’ (1986) *Mediation Quarterly* 17, 27.

⁷⁵⁹ Wolski, above n 15, 596; Boulle, above n 39, 237, 269.

⁷⁶⁰ A strong theme in the submissions made to NADRAC prior to release of its ‘Integrity of ADR’ Report was that participant conduct could be managed by ADR practitioners: *Maintaining and Enhancing the Integrity of ADR Processes Report*, above n 7, 31 [2.4]; 33 [2.4.3].

a number of techniques available to keep the parties and their lawyers ‘in line’. Ultimately, if a party or a lawyer acts contrary to established guidelines, a mediator can separate the parties and continue the mediation in shuttle format, or terminate the mediation.

On the question of substantive fairness, the propositions advanced by Schwartz and Rubin have been criticized for being too general⁷⁶¹ but they do not, in any event, seek to extend the law governing lawyers. They simply reiterate the doctrine of unconscionability. The proposals advanced by Menkel-Meadow – ‘do no harm’ and ‘do unto others as you would have them do unto you’ are fine sentiments but unworkable and vague (which Menkel-Meadow herself acknowledges in suggesting that they would be no more than aspirational guidelines).

There are a number of problems with Steele’s proposal. He does not define pivotal concepts such as ‘objectively fair’ and ‘cooperation’. Such concepts may not be susceptible to definition and they are subject to the same problems of lack of enforcement as good faith provisions. Rosenberger notes that any attempt to codify concepts such as fair dealing in the negotiation context ‘may well both be unworkable and create more problems than any such obligations would solve.’⁷⁶² Notwithstanding that the Victorian Parliament recently saw fit to include a directive to cooperate in civil proceedings (including dispute resolution processes associated with those proceedings),⁷⁶³ Condlin also writes of the difficulty ‘of expressing the idea of cooperative bargaining through the medium of rule-based incentives and constraints’.⁷⁶⁴ ‘Cooperation is not a formula or technique so much as it is an attitude or state of mind for approaching a bargaining setting’.⁷⁶⁵ He observes further that ‘[t]he idea of legislating cooperation has some of the same oxymoronic properties as ordering freedom or compelling moral action’.⁷⁶⁶ In any event, as will be illustrated shortly, a degree of competition is necessary for negotiations to be effective.

⁷⁶¹ White asserts that such general propositions are not helpful: White, above n 230, 929.

⁷⁶² Rosenberger, above n 273, 636-8. Also see Cooley who argues it would be difficult to draft a rule which was comprehensive, reasonable and fair: Cooley, above n 6, 275.

⁷⁶³ *Civil Procedure Act 2010* (Vic) s 20.

⁷⁶⁴ Condlin, above n 105, 98.

⁷⁶⁵ Ibid.

⁷⁶⁶ Ibid.

Steele also assumes, incorrectly, that all negotiations (including mediations) should be conducted using principled negotiation. He assumes, again incorrectly, that principled negotiation calls for complete candour and cooperation. The limitations of principled or interest-based negotiation are explored separately in this part of the exegesis.

Rutherford's proposal is also flawed. He does not define what he means by a 'fair outcome'. He goes too far in suggesting that lawyers should play a neutral role in mediation. If anyone in the mediation process should be neutral, it surely must be the mediator. It is unlikely that clients would retain separate representatives if those representatives were to function as neutrals.

And so Fox is strongly of the view that legal representatives owe a duty to the client, not the mediation process and not to a fair outcome.⁷⁶⁷

Some assert that the role of the lawyer in mediation is not to advocate for the client, but to assure the process is a fair one that results in a settlement satisfactory to all participants. But the ethical lawyer cannot apply that standard to his or her conduct in mediation. Whatever outward appearance the lawyer representing a client in mediation may assume, the duty of the lawyer must be clear: to represent the client and only the client during the entire mediation process.⁷⁶⁸

According to Fox, a range of conciliatory behaviours might be appropriate – 'but only if their sole purpose is to advance the interests of the client'.⁷⁶⁹ In the main, I agree with Fox except I would qualify his statements by adding that lawyers owe a paramount duty to the administration of justice and that there may be occasions when that duty supersedes the duty to the client (as it would, for example, when the client's interests diverged from those of children involved in a family law dispute). I agree with Fox that lawyers do not owe a duty to the mediation process and that they do not owe a duty to ensure a fair outcome (whatever that means). As discussed in Part 2, they do not even owe their own clients a duty to ensure a fair outcome.

⁷⁶⁷ Fox, above n 131, 39-40.

⁷⁶⁸ Ibid 40.

⁷⁶⁹ Ibid.

Rutherford is also incorrect in asserting that advocacy has no place in mediation. The connection between mediation and advocacy is discussed separately later in this part of the exegesis.

4.2.7 Proposals in Relation to Interest-based Negotiation

Steele proposes that lawyers in mediation should use ‘principled negotiation’.⁷⁷⁰ Parker and Evans assert that the purpose of ADR is ‘to assist the client to resolve their dispute through interest-based negotiation’.⁷⁷¹ Mendel-Meadow argues that mediation is premised on problem-solving negotiation.⁷⁷² All of these authors assert that the parties should use a particular approach to negotiation (variously referred to as principled, interest-based or problem-solving negotiation).

Parties in negotiation typically adopt one of two major approaches,⁷⁷³ positional (or distributive) negotiation or interest-based (or integrative) negotiation.⁷⁷⁴ In positional negotiation, each party begins by advocating a single specific solution (or position) to the problem. In order to maximise their respective gain, each party will usually adopt an extreme position and conceal information as to the level or point at which they are prepared to settle.⁷⁷⁵ An agreement can only be reached by the parties successively conceding to new positions. Proponents of interest-based negotiation argue that in the process of maintaining

⁷⁷⁰ Steele, above n 672, 1403.

⁷⁷¹ Parker and Evans, above n 17, 135.

⁷⁷² Mendel-Meadow, above n 2, *Ethics in Alternative Dispute Resolution*, 430, 450.

⁷⁷³ An approach to negotiation must be distinguished from a negotiation style. The latter (style) refers to the general overall behaviour of a negotiator while an approach refers to the manner or process by which he or she negotiates. Styles can also be cooperative or competitive. However, it does not necessarily follow that a positional negotiator will be competitive in style, or that an interest-based negotiator will adopt a cooperative style. A party may bargain cooperatively over positions.

⁷⁷⁴ Moore, above n 39, 73. Negotiation theorists generally identify two approaches to negotiation, namely principled or interest-based vs. positional (Fisher and Ury, above n 183, 11); integrative vs. distributive (Howard Raiffa, *The Art and Science of Negotiation* (Belknap Press of Harvard University Press, 1982) 33); cooperative vs. competitive (Dean G Pruitt, *Negotiation Behavior* (Academic Press Inc., 1981) 15); problem-solving vs. share-bargaining (C L Karrass, *The Negotiating Game* (Thomas Y. Crowell Publishers, 1970) 127); or in popular terminology, win/win vs. win/lose. Some commentators adopt more elaborate typologies eg, Carrie Menkel-Meadow describes four different approaches to negotiation but then discusses a simplified framework of adversarial vs problem-solving: Carrie Menkel-Meadow, ‘Toward Another View of Legal Negotiation: The Structure of Problem Solving’ (1983-1984) 31 *University of California Los Angeles Law Review* 754, 756-8; while Donald Gifford recommends a typology for negotiation strategies consisting of competitive, cooperative, and integrative. However Gifford notes that there is some confusion in this area because ‘no one has codified a generally accepted typology or terminology of negotiation strategies ... and there is little consistency in the descriptions and names of noncompetitive theories’. The latter are variously referred to as collaborative, cooperative, interest-based, integrative and problem-solving: see Gifford, above n 258, 43.

⁷⁷⁵ Lewicki, Barry and Saunders, above n 20, 49-50.

and then giving up on a series of positions, the parties may overlook the reasons why they originally adopted the position (ie to satisfy their needs or interests). As a result, the agreement reached may not be reflective of the interests of either party.⁷⁷⁶

In interest-based negotiation, attention is given to the needs or interests of the parties, the reasons why they have adopted a particular position rather than to the position itself.⁷⁷⁷ The rationale for focusing on interests is that for every interest there may exist several possible solutions that could satisfy it. It may be possible to find a solution which meets the interests of all parties.⁷⁷⁸ In the sense that interest-based negotiation seeks to broaden the range of acceptable solutions, it is said to expand the pie to be divided between the parties (for this reason, it is often referred to as value creating rather than value claiming negotiation).

Interest-based negotiation was popularized by Fisher and Ury in their book *Getting to Yes: Negotiating Agreement Without Giving In*.⁷⁷⁹ Their model of interest-based negotiation relies upon the following four principles:⁷⁸⁰

1. 'Separate the people from the problem':⁷⁸¹ disentangle the people problems from the substantive problems and work on each separately.
2. 'Focus on interests, not positions':⁷⁸² identify and make explicit the needs or interests that the people want satisfied from the negotiation.⁷⁸³
3. Generate a variety of options for mutual gain: before deciding upon a specific solution, invent a variety of alternatives 'that advance shared interests and creatively reconcile differing interests'.⁷⁸⁴
4. 'Insist that the result be based on some objective standard':⁷⁸⁵ where interests conflict, make a decision based on 'some fair standard independent of the naked will of either side'.⁷⁸⁶

⁷⁷⁶ Fisher and Ury, above n 183, 5.

⁷⁷⁷ Ibid 11.

⁷⁷⁸ Ibid 43.

⁷⁷⁹ Ibid.

⁷⁸⁰ Bobette Wolski, 'The Role and Limitations of Fisher and Ury's Model of Interest-based Negotiation in Mediation' (1994) 5 *Australian Dispute Resolution Journal* 210, 211.

⁷⁸¹ Fisher and Ury, above n 183, 11.

⁷⁸² Ibid.

⁷⁸³ Ibid.

⁷⁸⁴ Ibid 12.

⁷⁸⁵ Ibid 11. Condlin asserts that the distinctive characteristic of interest-based negotiation is its insistence on using objective criteria: Condlin, above n 105, 25.

⁷⁸⁶ Fisher and Ury, above n 183, 12.

According to Fisher and Ury, the desired outcome of interest-based negotiation is a ‘wise agreement’,⁷⁸⁷ defined by Fisher and Ury as ‘one which meets the legitimate interests of each side to the extent possible, resolves conflicting interests fairly, is durable, and takes community interests into account’⁷⁸⁸ and which is reached through a process that does not adversely affect the parties’ relationship.⁷⁸⁹

There is undoubtedly a procedural bias towards interest-based negotiation in mediation. Much of the literature (and rhetoric) pertaining to mediation has it premised on ‘interest-based’ negotiation.⁷⁹⁰ Most mediators are trained in some variant of Fisher and Ury’s model⁷⁹¹ and in at least one model of mediation (ie the facilitative model), there is a clear focus on interests rather than positions.⁷⁹² The terminology of interest-based negotiation has even found its way into some mediator standards. For example, clause 2.1.5 of the Queensland Law Society’s *Standards of Conduct for Solicitor Mediators* (at 23 September 1998)⁷⁹³ states that one of the functions of mediators is to ‘promote interest-based bargaining among the parties where possible’.

Presently neither the law of lawyering (including the professional conduct rules) nor any rule of custom requires lawyers (or their clients) to use interest-based negotiation. Nor is there any prohibition on lawyers acting competitively rather than cooperatively. This position should be maintained for interest-based negotiation is not always possible or appropriate.

4.2.8 Problems with Proposals Requiring Interest-based Negotiation

Many situations are not amenable to interest-based negotiation. Interest-based negotiation assumes that ‘the pie can be expanded’ by focusing on interests and inventing alternative solutions that leave everyone satisfied. However, in real life the opportunities to create

⁷⁸⁷ Fisher and Ury, above n 183, 4; Gifford, above n 258, 46.

⁷⁸⁸ Fisher and Ury, above n 183, 4.

⁷⁸⁹ Ibid.

⁷⁹⁰ See, eg, Folberg and Taylor’s definition of mediation, one of the most popular early definitions of ‘mediation’, which emphasised several of the stages of Fisher and Ury’s model: Folberg and Taylor, above n 39, 7. Also see Moore, above n 39, 76.

⁷⁹¹ Lawrence, above n 73, 427. In fact, the text *Getting to Yes*, has secured a pivotal position as a foundational text for many ADR training courses: Wilson, above n 598, 6.

⁷⁹² Bogdanoski, above n 523, 30; Burns, above n 2, 692-3. According to at least one commentator, mediators have a procedural bias towards interest-based negotiation: Moore, above n 39, 77.

⁷⁹³ Queensland Law Society, *Standards of Conduct for Solicitor Mediators* (at 23 September 1998).

integrative solutions that meet the interests of all the parties might be limited. They are likely to be limited when:⁷⁹⁴

1. The underlying interests or values of the parties are actually opposed (as they are in the right to life versus right to abortion debate).
2. There is one critical issue involved (for instance, the amount of compensation to be paid for injury to a person or damage to property or where each side claims exclusive possession of property).⁷⁹⁵ When compensation is the issue, one more dollar for the victim usually means one less dollar for the insurance company. Some authors claim that single-issue negotiations do not exist, except in theory. When the central issue is the amount of money to change hands (as compensation or for the purchase of a commodity), the timing and manner of payment are also negotiable issues.⁷⁹⁶ In addition, the parties usually have a mutual interest in the process or manner by which their substantive issue is resolved. But it is undoubtedly the case that the opportunities for integrative bargaining are fewer when there are fewer disputed issues on the negotiation table.⁷⁹⁷
3. There are conflicting objective criteria (such as varying judicial decisions and a number of different opinions from experts).⁷⁹⁸ The search for objective criteria may result in a conflict as to which criteria are more legitimate or persuasive. Alternatively, there may be no objective criteria by which to gauge likely outcomes (in this case, it may be appropriate to obtain an authoritative decision from a judge). In fact, Fisher and Ury conceded that in most negotiations there will be no one 'right'

⁷⁹⁴ Wolski, above n 780, 214-7. Wetlaufer also uses a number of fact scenarios to demonstrate that 'opportunities for integrative bargaining, especially meaningful opportunities for integrative bargaining (e.g., where the pie may be made to expand and to stay expanded), exist within a narrower range of circumstances than sometimes has been claimed': Gerald B Wetlaufer, 'The Limits of Integrative Bargaining' (1996-1997) 85 *Georgetown Law Journal* 369, 390.

⁷⁹⁵ Wolski, above n 780, 215-6; Raiffa, above n 774, 13; Raymond A Whiting, 'The Single-Issue, Multiple-Issue Debate and the Effect of Issue Number on Mediated Outcomes' (1992) 10 *Mediation Quarterly* 57.

⁷⁹⁶ Ross P Buckley, 'The Applicability of Mediation Skills to the Creation of Contracts' (1992) 3 *Australian Dispute Resolution Journal* 227, 235; Whiting, above n 795.

⁷⁹⁷ Gifford, above n 258, 70.

⁷⁹⁸ Wolski, above n 780, 217. Fisher and Ury do not explain why it is reasonable to find only one meta-criterion: Condlin, above n 105, 33.

or ‘fairest’ answer and that people will advance different standards by which to judge what is fair.⁷⁹⁹

In all three situations described above (when interests or values conflict, when there is one critical issue involved and where objective criteria are uncertain or absent), the parties are likely to adopt a positional approach to negotiation.⁸⁰⁰

While there are more opportunities to expand the pie in multiple-issue negotiations,⁸⁰¹ ‘one simple fact remains: [s]ooner or later, that pie must be cut and the value claimed’.⁸⁰² Most negotiations will reach a distributive phase where value is being claimed,⁸⁰³ a point at which ‘the gains of one party are won at the loss of the other’.⁸⁰⁴ When that point is reached, each party will be interested in getting a bigger slice of the pie and in convincing the other side, and the mediator, of the merits of their position. At that point, the parties will use tactics associated with distributive negotiation.⁸⁰⁵

⁷⁹⁹ Fisher and Ury, above n 183, 153. Wheeler points out that even the standards that Fisher and Ury suggest eg legal precedents, business norms etc may not themselves be just: Michael Wheeler, ‘Swimming with Saints/Praying with Sharks’ in Menkel-Meadow and Wheeler, above n 16, xxxvii.

⁸⁰⁰ Even Fisher and Ury recognise that some situations are not amenable to interest-based negotiation. They concede that positional bargaining might be the best way to proceed where the negotiation concerns a single issue (such as the price to be paid for a commodity), where it takes place among strangers, where the transaction costs of exploring each party’s interests are high and where each side is protected by competitive opportunities: Roger Fisher, ‘Negotiating Power’ (1983) 27 *American Behavioral Scientist* 123, 149.

⁸⁰¹ The parties will only reap the benefit of these opportunities if they negotiate on issues simultaneously. If they negotiate on one issue at a time – that is, they negotiate issues sequentially rather than simultaneously, they are likely to take up successive positions and make successive concessions until a point of agreement is reached in relation to each issue. Agreement on any one issue may reduce the ability to make trade-offs on later issues and reduce the number of options available for overall resolution of the problem: Jeffrey Z Rubin and Bert R Brown, *The Social Psychology of Bargaining and Negotiation* (Academic Press Inc, 1975) 146; Wolski, above n 780, 218.

⁸⁰² Zachery Z Annable, ‘Beyond the Thunderdome – The Search for a New Paradigm of Modern Dispute Resolution: The Advent of Collaborative Lawyering and Its Conformity with the Model Rules of Professional Conduct’ (2004-2005) 29 *Journal of the Legal Profession* 157, 164 (citations omitted). Also see Wetlaufer, above n 794, 390.

⁸⁰³ Also see Kay Elkins-Elliott and Frank W Elliott, ‘Settlement Advocacy’ (2004-2005) 11 *Texas Wesleyan Law Review* 7, 21; Norton, above n 161, 530.

⁸⁰⁴ Karrass, above n 774, 145. Also see James J White, ‘Essay Review: The Pros and Cons of “Getting to Yes”’ and Comment by Roger Fisher (1984) 34 *Journal of Legal Education* 115, 116.

⁸⁰⁵ Wetlaufer, above n 794, 390; Raymond A Friedman and Debra L Shapiro, ‘Deception and Mutual Gains Bargaining: Are They Mutually Exclusive?’ (1995) 11 *Negotiation Journal* 243, 250. In this context, the terms ‘integrative’ and ‘distributive’ bargaining are more apt than interest-based and positional negotiation. See Wetlaufer for a useful description of integrative and distributive bargaining: 370.

The reality then is that ‘even within the range of circumstances in which there are significant opportunities for integrative bargaining, the bargainer must almost always engage in distributive bargaining as well’.⁸⁰⁶ Put another way, most negotiations involve a mixture of styles and approaches; they are neither purely integrative nor purely distributive.⁸⁰⁷

Cooperative tactics (eg being open, sharing information and not misleading about minimum requirements) are thought appropriate to interest-based negotiation while more competitive tactics (making high opening offers and small and slow concessions, concealing and misrepresenting information, threatening and bluffing) are generally associated with positional negotiation.⁸⁰⁸ But this categorisation is an oversimplification – negotiators may select tactics from both sets ie they may simultaneously (or sequentially) employ both cooperative and competitive tactics.⁸⁰⁹ ‘[F]ew negotiations occur where a wise negotiator would not employ at least some of each set of behaviors. Indeed, one of the more interesting challenges faced by negotiators is how to balance both of these elements.’⁸¹⁰

Most negotiators will have to manage a constant tension between integrative and distributive moves. Rubin writes of the way in which negotiators are continually pulled in a number of extreme directions.⁸¹¹ He identifies three ‘tightropes of negotiation’ along which negotiators must traverse and, ultimately, attempt to find some balance.⁸¹² The tightropes (or extremes) that he identifies are:

Cooperation as against competition. A negotiator will want to be competitive enough to secure the most favourable outcome for herself or himself but not so competitive as to alienate the other party. A negotiator will also want to be cooperative enough to ensure an agreement is reached but not so cooperative as to give up more than is necessary.

⁸⁰⁶ Wetlaufer, above n 794, 390.

⁸⁰⁷ Friedman and Shapiro, above n 805, 244, 247.

⁸⁰⁸ Wetlaufer, above n 794, 371.

⁸⁰⁹ Gifford, above n 258, 57. Also see Gifford’s discussion of Dean Pruitt’s strategic choice model of negotiation ‘which recognises that various negotiation strategies will be used in the same negotiation’: Gifford, above n 258, 57.

⁸¹⁰ Friedman and Shapiro, above n 805, 247. This tension is recognised by other authors, see, eg, Craver, above n 283, 305; Alex J Hurder, ‘The Lawyer’s Dilemma: To Be or Not To Be a Problem-Solving Negotiator’ (2007-2008) 14 *Clinical Law Review* 253, 291; Annable, above n 802, 33; Gifford, above n 258, 42.

⁸¹¹ Also on the tensions facing negotiators, see Jonathan M Hyman, ‘Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?’ (1986-1987) 34 *University of California Los Angeles Law Review* 863, 889-93.

⁸¹² Rubin, above n 67, 136-7. For a discussion on ‘negotiation tightropes’, see Wolski, above n 15, 497-8.

‘[O]verly cooperative negotiators will fail to engage in the most creative problem solving and reach the most effective outcomes’.⁸¹³

Honesty and openness as against misrepresentation and non-disclosure. Candour can help negotiators expand the bargaining zone (the area in which an agreement is possible) but if a negotiator is too honest and open, he or she runs the risk of being exploited. On the other hand, if a negotiator adopts a policy of non-disclosure and even misrepresentation, he or she may lose the trust of the other side.⁸¹⁴

Short-term gains as opposed to long-term gains. If a negotiator pushes hard and ruthlessly in order to secure short-term goals, he or she runs the risk of losing the cooperation and respect of other parties that may be needed to secure long-term goals in the next round of negotiations.⁸¹⁵

As Rubin’s work demonstrates, negotiation is ‘a study in tensions’. Condlin captures these tensions in stating that:

If dispute settlement is primarily strategic, its central strategic choice is whether to cooperate or compete, both in deciding how to make each of the hundreds of individual tactical maneuvers and moves that make up a single negotiation, and in selecting an overall bargaining strategy. These decisions include whether to share information or conceal it, exploit leverage or seek a fair return, browbeat an adversary or discuss and analyse views evenhandedly, and describe wants accurately or inflate and state them as demands. With respect to the selection of an overall strategy, these decisions also include whether to give the opponent the benefit of the doubt and cooperate until betrayed, or to assume the worst and try for a pre-emptive or decisive first strike’.⁸¹⁶

⁸¹³ Burr, above n 202, 13.

⁸¹⁴ The question of how much candour to exhibit is ‘one of the most difficult normative questions with which negotiators wrestle’: Russell Korobkin, ‘A Positive Theory of Legal Negotiation’ (1999-2000) 88 *Georgetown Law Journal* 1789, 1816.

⁸¹⁵ This assumes a long term relationship. Condlin notes that ‘in any single negotiation, where there is no prospect of future dealing, it is usually irrational for individual bargainers to act cooperatively’: Condlin, above n 105, 12. Also see Wolski, above n 15, 498.

⁸¹⁶ Condlin, above n 105, 11.

Condlin confirms that an effective negotiator uses both cooperative and competitive strategies, noting that:

Successful bargainers are those who blend cooperative and competitive choices into a unified approach so that they are able to share private information without making themselves disproportionately vulnerable, test differing legal views without weakening their support for nonrelated issues, and invent and make multiple proposals for settlement without committing themselves to the worst of the possibilities. They cooperate with an eye toward protecting their competitive positions and compete so as not to preclude the development of mutual trust and bipartisan effort, even though competitive strategies make cooperation more difficult and cooperative moves make parties disproportionately vulnerable to competitive responses.⁸¹⁷

Those commentators who call for use of interest-based negotiation (including Fisher and Ury, Steele, Mendel-Meadow and Parker and Evans), ignore a great deal about the reality and theory of negotiation. Condlin concludes that ‘ADR bargaining scholarship overdid things somewhat, rejecting all types of adversarial maneuvering rather than just its mean-spirited and asocial forms’.⁸¹⁸

As a more realistic alternative (although still inclined towards interest-based negotiation), Robinson proposes that practitioners take a ‘cautiously cooperative approach to mediation’⁸¹⁹ to deal with the tension between integrative and distributive negotiation.⁸²⁰ He urges negotiators to ‘be cautious and circumspect, revealing as little and defending as much as possible until the other’s intentions are known.’⁸²¹ This approach is nothing but common sense.

There are two additional overlapping misconceptions about mediation and interest-based negotiation that often appear in the literature. First, it is wrongly assumed that interest-based negotiation is synonymous with ethical negotiation (and that positional negotiation is

⁸¹⁷ Condlin, above n 105, 11. Also see Condlin’s detailed analysis of a number of cooperative or communitarian approaches to negotiation including cordial bargaining, principled bargaining and the problem-solving bargaining model proposed by Menkel-Meadow: Condlin, above n 672, 16-34.

⁸¹⁸ Condlin, above n 672, 88. Wetlaufer echoes this sentiment in noting that: ‘[i]t seems clear that there has been a certain amount of overclaiming that has been done in the name of integrative bargaining’: Wetlaufer, above n 794, 391.

⁸¹⁹ Peter Robinson, ‘Contending with Wolves in Sheep’s Clothing: A Cautiously Cooperative Approach to Mediation Advocacy’ (1998) 50 *Baylor Law Review* 963.

⁸²⁰ Ibid 963.

⁸²¹ Condlin, above n 105, 9.

unethical). Second, it is wrongly assumed that interest-based negotiation requires complete candour.

Ethics and interest-based negotiation are separate issues (although it is not uncommon for proponents of interest-based negotiation or Mutual Gains Bargaining (MGB)⁸²² to equate the two).⁸²³ In fact, neither the interest-based (integrative) nor positional (distributive) approach is unethical.⁸²⁴ Unfortunately, the ‘principles’ of interest-based negotiation enumerated by Fisher and Ury ‘inadvertently’ give the impression that they are more ‘honest’ and ethical than traditional negotiations (especially with the label ‘principled’ being used to describe the approach).⁸²⁵ As a result ‘[e]thics and MGB become conflated’.⁸²⁶

But as Friedman and Shapiro point out:

MGB suggests that negotiators explain to their opponent what their *interests* are, so that the opponent can propose actions that meet one’s real needs at least cost. It does not, however, say anything about revealing one’s alternatives to a negotiated agreement, what one’s true reservation price is, or how much money is in the bargaining budget – all of which influence what final *position* will be acceptable.⁸²⁷

In other words, MGB and deception are not mutually exclusive, as some proponents of MGB claim.⁸²⁸

MGB says only that you should not deceive the other party about your core, underlying interests. And – this is worth emphasizing – the reason for this prescription is not that being honest about interests is inherently ethical. Rather, it is that being honest about one’s interests can help you get more.⁸²⁹

⁸²² Friedman and Shapiro refer to interest-based negotiation as Mutual Gains Bargaining or MGB: Friedman and Shapiro, above n 805, 244.

⁸²³ Ibid.

⁸²⁴ McKay, above n 568, 19.

⁸²⁵ Friedman and Shapiro, above n 805, 246.

⁸²⁶ Ibid 247.

⁸²⁷ Ibid 246.

⁸²⁸ Ibid 244.

⁸²⁹ Ibid 246.

Wetlaufer takes the same view as Friedman and Shapiro stating that the argument for openness and truth-telling in interest-based negotiation is not an argument for openness and truth-telling with respect to everything, but instead is ‘limited to information useful in identifying and exploiting opportunities for integrative bargaining’.⁸³⁰ Even in interest-based negotiation, negotiators may hide their true level of dependency (eg by asserting that they have other offers), fail to disclose their bottom line and exaggerate the value of their options in the event of no agreement.⁸³¹

The truth of these assertions is borne out by statements from members of the pro interest-based negotiation camp. For example, Menkel-Meadow, the most ardent of proponents for new rules for mediation, concedes that ‘completely open, information sharing, trusting, and joint-solution seeking behaviour’ will not be appropriate or fair in all settings.⁸³² And Peppet states that ‘[c]ollaboration does not mean revealing all of one’s information, preferences, interests, and litigation strategies’.⁸³³ Hurder claims that the problem-solving approach does not require total disclosure of a party’s secrets and confidences (and he categorically states that it does not require lawyers to violate the confidentiality of clients),⁸³⁴ but it does require that the parties take the risk of exposing themselves to some degree.⁸³⁵ Even in interest-based negotiation, honesty and full candour is not the norm.

Finally, I suspect that some proponents of interest-based negotiation in mediation think that mediation should be about interests, not law – after all, one of its principles is to focus on interests. They forget that one of the other principles of interest-based negotiation is to use objective criteria to determine differences and that the law is one such criteria. There is nothing wrong with arguing over legal rights in informal dispute settlement. As Condlin asserts, ‘[l]egal argument contributes to the legitimacy of bargained-for agreements by resolving the substantive conflicts at the base of disputes’.⁸³⁶ As he sees it, substantive competitiveness ‘is indispensable to successful bargaining’.⁸³⁷ Substantive competitiveness includes eg making strong demands when warranted, refusing to change views without good

⁸³⁰ Wetlaufer, above n 794, 390-1.

⁸³¹ Friedman and Shapiro, above n 805, 245.

⁸³² Menkel-Meadow, above n 16, xxx (she does not indicate the circumstances in which it would not be appropriate).

⁸³³ Peppet, above n 28, 535.

⁸³⁴ Hurder, above n 810, 295.

⁸³⁵ Ibid 276.

⁸³⁶ Condlin, above n 672, 82.

⁸³⁷ Condlin, above n 105, 22.

reasons, and supporting positions with well-developed arguments – ‘its goal is to have one’s views about applicable law or practical concerns adopted by the parties as the basis for settlement, and thus, to produce the best outcome consistent with the strength of one’s substantive claims’.⁸³⁸ Surely there is a role for a legal *advocate* in this process.

4.2.9 Proposals to ‘Remove’ (Adversarial) Advocacy from Mediation

As was noted earlier, Rutherford believes that advocacy has no place in mediation.⁸³⁹ Menkel-Meadow and Schuwerk both assert that the ‘ethic of zeal’ associated with adversarial advocacy is incompatible with mediation, and in particular, that ‘excessive adversarial zeal can undermine the goals of mediation’.⁸⁴⁰ Bowie thought that mediation might, by its nature, require non-adversarial behavior.⁸⁴¹ Drawing upon the New South Wales Law Society’s *Professional Standards for Legal Representatives in a Mediation*, Parker and Evans assert that it is the duty of the lawyer ‘[t]o participate in a non-adversarial manner.’⁸⁴²

4.2.10 Problems with Proposals in Relation to Adversarial Advocacy

There are several separate issues involved in the assertion that excessive and/or zealous adversarial advocacy is incompatible with mediation (although the authors mentioned above do not unravel them). The issues are:

1. Is there a place for excessive adversarial zeal in mediation?
2. Is advocacy (even zealous advocacy) incompatible with mediation?
3. Is all advocacy adversarial in nature (because that is the assumption made by the authors mentioned above)?
4. Must the parties and their lawyers behave in a non-adversarial manner in mediation?

The answer to the first two questions depends on how one defines ‘zeal’; the answer to questions numbered two and three depends on how ‘advocacy’ is defined.

⁸³⁸ Ibid.

⁸³⁹ Rutherford, above n 757, 27.

⁸⁴⁰ Schuwerk, above n 2, 765 (Schuwerk was commenting on Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 427).

⁸⁴¹ Bowie, above n 6, 34.

⁸⁴² Parker and Evans, above n 17, 135. The standard to which they refer is not drafted in the language of a rule: see the Law Society of New South Wales, *Professional Standards for Legal Representatives in a Mediation* (at 1 January 2008) s 2.3.

Menkel-Meadow chose to use ‘zeal’ in such a way as to ‘high-light the “zealotry” implicated in zeal’.⁸⁴³ But other commentators reject this meaning. For example, Bernstein argues that it is an error to equate zeal with zealotry.⁸⁴⁴ Bernstein suggests that ‘zeal’ has two elements, a ‘commitment to one side (rather than to a neutral search for truth)’ and passion.⁸⁴⁵ With respect to the first element of zeal, he argues that all conscientious lawyers, even in transactional work, anticipate the possibility that harmony will turn sour and practise with a ‘potential adversary in mind’.⁸⁴⁶ This approach does not preclude ‘treating this adversary with kindness or even deference, if such treatment would serve the needs of one’s client’.⁸⁴⁷ Partisan commitment might even lead a lawyer to recommend settlement to a client.⁸⁴⁸ Bernstein argues that the second element of zeal - passion - requires effectiveness, creativity, attention to detail, ‘enthusiasm, energy, and benevolent effort’.⁸⁴⁹

However ‘zeal’ is defined, most authors agree that *excessive* adversarial zeal is out of place, in mediation and in litigation.⁸⁵⁰ There is no place in either context for ‘table-pounding, endless discovery or boisterous behaviour’⁸⁵¹ or ‘for a win-at-all costs mentality, and out-and-out dishonesty’.⁸⁵²

⁸⁴³ Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 430.

⁸⁴⁴ Anita Bernstein, ‘The Zeal Shortage’ (2005-2006) 34 *Hofstra Law Review* 1165, 1175, 1178. She also argues that it is an error to equate zeal with agency, in the sense of lawyers being prepared to do the client’s bidding: 1177.

⁸⁴⁵ *Ibid* 1171.

⁸⁴⁶ *Ibid*.

⁸⁴⁷ *Ibid* 1172.

⁸⁴⁸ *Ibid*.

⁸⁴⁹ *Ibid* 1174.

⁸⁵⁰ Fox, above n 131, 41; Hazard, above n 120, 379. Generally see Fred C Zacharias, ‘Five Lessons For Practicing Law In The Interests of Justice’ (2002) 70 *Fordham Law Review* 1939.

⁸⁵¹ Fox, above n 131, 41.

⁸⁵² Sandra S Beckwith and Sherri G Slovin, ‘The Collaborative Lawyer as Advocate: A Response’ (2002-2003) 18 *Ohio State Journal on Dispute Resolution* 497, 498.

But there are authors who see a place for zealous advocacy in mediation.⁸⁵³ For example, Bordone opines:⁸⁵⁴

In my view, the duty of zealous advocacy is not the problem. Whether a lawyer is representing a client in mediation, arbitration, litigation, or negotiation, a goal of zealous advocacy in the interest of the client is laudable. We need not back away from this in any re-design of ethics rules for negotiators. The problem is not zealous advocacy, but rather what zealous advocacy might mean in the context of each individual dispute resolution process. In litigation, zealous advocacy means winning an argument by persuading a third person (a jury or judge) that your version of events or your understanding of the law is true or correct. On the other hand, in negotiation, zealous advocacy entails identifying the underlying interests of the client and then employing one's skills of listening, creativity, and joint problem-solving to best meet those interests and attain a satisfying and efficient outcome.⁸⁵⁵

Of course, advocacy must also be defined (authors who argue against it tend not to define it). Bordone gives a satisfactory definition of advocacy in the context of litigation in the last mentioned quotation. Former Chief Justice Kirby similarly notes that in the litigation context, an advocate has the *task* of *persuading* 'the decision-maker (judge, magistrate, tribunal member, juror) to accept the propositions advanced by the advocate leading to the success of the advocate's cause.'⁸⁵⁶ I emphasise the words 'task'⁸⁵⁷ and 'persuading' because advocacy might be thought of as the task of persuading another.⁸⁵⁸ Indeed, advocacy has been defined very broadly as 'the art of persuasion'.⁸⁵⁹ In mediation, an advocate's task is to

⁸⁵³ See, eg, Fox, above n 131, 39-41 (who argues that zealous advocacy and mediation are compatible concepts and that lawyers' duties are to their clients not the mediation process). For other authors who argue that advocacy, and even zealous client representation, is indispensable in mediation: see, eg, John W Cooley, *Mediation Advocacy* (National Institute for Trial Advocacy, 2nd ed, 2002) 127; Harold I Abramson, *Mediation Representation: Advocating in a Problem-Solving Process* (National Institute for Trial Advocacy, 2004) 7; Bordone, above n 8, 11. Also see John H Phillips, 'Practical Advocacy: Advocacy in Mediation' (1994) 68 *Australian Law Journal* 384.

⁸⁵⁴ Bordone above n 8, 11. Abramson asserts that '[i]nstead of advocating as a zealous adversary, you should advocate as a zealous problem-solver': Abramson, above n 853, 2, 22.

⁸⁵⁵ Bordone, above n 8, 23. Also see Sternlight, above n 757, 291-2 who also defines advocacy in broad terms and supports its use in mediation.

⁸⁵⁶ Justice Michael D Kirby, 'Ten Rules of Appellate Advocacy' (1995) 69 *Australian Law Journal* 974, 965.

⁸⁵⁷ Karl Mackie conceived of lawyering activities as a series of tasks the performance of which requires the exercise of 'a *collection or repertoire* of skills': see Karl Mackie, 'Lawyers' Skills: Educational Skills' in Karl Mackie, Neil Gold and William Twining (eds), *Learning Lawyers Skills* (Butterworths, 1989) 18. For a discussion of the way in which lawyering activities can be divided into progressively smaller units or elements (from transactions, to tasks, to skills, to sub-skills), see Mackie: 11 and 18; Wolski, above n 15, 21-22.

⁸⁵⁸ Simon Lee and Marie Fox, *Learning Legal Skills* (Blackstone, 2nd ed, 1991) 155.

⁸⁵⁹ George Hampel, Introduction to Max G Perry, *Hampel on Advocacy: A Practical Guide* (Leo Cussen Institute, 1996); Kirby, above n 856, 965. In the legal context, Napley notes that 'virtually all tasks undertaken by lawyers on behalf of clients are for the most part, themselves a form of advocacy - the employment of the

persuade the other party⁸⁶⁰ and more controversially, the mediator. In this respect, I think the drafters of the *LCA Guidelines for Lawyers in Mediations* had the wrong idea about advocacy. Clause 6.2 of the guidelines state:

The skills required for a successful mediation are different to those desirable in advocacy. It is not the other lawyer or mediator that needs to be convinced; it is the client on the other side of the table. A lawyer who adopts a persuasive rather than adversarial or aggressive approach, and acknowledges the concerns of the other side, is more likely to contribute to a better result.

Clause 6.2 still speaks of advocacy – ie persuasion.

More recently, Julie Macfarlane expressed similar views on this topic and in the process, she appears to have coined some new phrases, those of ‘settlement advocacy’ and ‘client resolution advocacy’.⁸⁶¹ She opines:

There is no lessening of the lawyer’s responsibility to achieve the best possible outcome for his client in client resolution advocacy. In fact, advocacy as conflict resolution places the constructive and creative promotion of partisan outcomes at the center of the advocate’s role and sees this goal as entirely compatible with working with the other side. In fact, this goal can *only* be achieved by working with the other side. The new lawyer remains just as dedicated to achieving her client’s goals as the warrior or adversarial advocate. What changes is that her primary skill becomes her effectiveness and ability to achieve the best possible negotiated settlement, while she remains prepared to litigate if necessary. There is no contradiction between a commitment to explore every possibility of facilitating an agreement with the other side and a strong primary loyalty to one’s own client. ... A contradiction between client loyalty and creative consensus building only exists if counsel is convinced that the only effective way to advance the client’s wishes is by using rights-based processes. Aside from these fairly exceptional cases, the goal of the conflict resolution advocate is to persuade the other side to settle – on her client’s best possible terms.⁸⁶²

technique of persuasion’: David Napley, *The Technique of Persuasion* (Sweet and Maxwell, 4th ed, 1991) 1. For even broader definitions of advocacy, see Lee and Fox, above n 858, 155; Timothy Pinos, ‘Advocacy Training: Building The Model - A Theoretical Foundation’ (1983) 1 *Journal of Professional Legal Education* 18. For more detailed discussion on the meaning attributed to ‘advocacy’, see Wolski, above n 15, 679-81.

⁸⁶⁰ Lawrence also declares that ‘[m]ediation requires a change in mind-set from adversarial proceedings because the objective is different. At trial, the goal is to persuade the judge. In mediation, the goal is to persuade the other party to the dispute’: Lawrence, above n 73, 426-7.

⁸⁶¹ Marilyn A K Scott, ‘Collaborative Law: Dispute Resolution Competencies for the “New Advocacy”’ (2008) 8 *Queensland University of Technology Law and Justice Journal* 213, 227.

⁸⁶² Julie Macfarlane, ‘The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law’ [2008] *Journal of Dispute Resolution* 61, 66.

Some of these authors touch upon the skills required by lawyers in representing or advocating for their clients in mediation. This is a topic to which I return shortly.

Clearly, not all advocacy is adversarial - if by that term we mean that representatives act like combatants. Bordone speaks of advocates engaging in joint problem-solving, while Macfarlane speaks of the advocate working with the other side. An advocate will consider solutions that accommodate the interests of other parties as well as those of their client, and help clients to see that solutions, not judgments, may be in their best interests.⁸⁶³

Finally, must the parties and their lawyers behave in a non-adversarial manner in mediation? The answer to this question is 'no'. Mediation need not be non-adversarial to retain its character as mediation.⁸⁶⁴ The same is true of unassisted negotiation. A client may approach mediation as a contest, determined to advance his or her legal position, rather than to secure an agreement which satisfies everyone's interests. This fact does not mean the dispute is inappropriate for mediation and it does not make mediation ineffective. In order for the parties to reach an agreement, a proposal need only address the other side's interests sufficiently well to move toward agreement.⁸⁶⁵ It may still be to everyone's advantage to avoid legal costs and the trauma associated with a court case.

In her work on negotiation, Norton expresses the view that 'the basic character of the [negotiation] relationship is always in some respect adversarial'⁸⁶⁶ although 'cooperative or problem-solving bargaining strategies and tactics are used'.⁸⁶⁷ Indeed, she believes that '[a]n adversarial posture is necessary in bargaining to protect and advance the parties' interests, including their interests in ethical treatment'.⁸⁶⁸ An adversarial posture 'facilitates the search for truthful information, helps guard against injurious disclosures, and helps prevent treatment that could prejudice a party's interests'.⁸⁶⁹ But, lying and unfairness are 'not a

⁸⁶³ Ted Schneyer, 'Some Sympathy for the Hired Gun' (1991) 41 *Journal of Legal Education* 11, 27; Lawrence, above n 73, 443.

⁸⁶⁴ Boulle, above n 39, 70-1.

⁸⁶⁵ Abramson, above n 6, 118.

⁸⁶⁶ Norton, above n 161, 530. Also see Condlin who asserts that '[a]ll bargaining, even its communitarian form, is a lying game to some extent, and one in which adversarial behavior plays an inevitable role. To pretend otherwise is to deny reality, actual and imagined': Condlin, above n 672, 73.

⁸⁶⁷ Norton, above n 161, 530.

⁸⁶⁸ Ibid 529.

⁸⁶⁹ Ibid 530.

necessary function of the adversarial posture'.⁸⁷⁰ 'The posture requires partisanship, not its excesses'.⁸⁷¹

4.3 The Lawyer's Role: New Skills

Menkel-Meadow claims that new professional conduct rules are needed because legal representatives perform different *roles* in ADR from traditional adversary practice.⁸⁷² I do not agree with this view. To a large extent, the roles undertaken by legal representatives in a particular mediation will depend on the knowledge, skills, actions and attitudes of the mediator. At one extreme, legal representatives may be no more than passive observers (in fact, lawyers may not even be present at the mediation). At the other extreme, lawyers may take on the role of spokesperson for the client.⁸⁷³ But generally, as with litigation, so too with mediation - a lawyer may be required to undertake the roles of adviser, evaluator/risk assessor, counsellor, negotiator, advocate, and drafter of documents. As Nolan-Haley notes, '[t]he scope of representational lawyering in mediation encompasses the functions which lawyers perform generally for clients: counselling, negotiation, evaluation, and advocacy.'⁸⁷⁴ To discharge these roles, lawyers perform a common set of tasks such as:

- gathering/giving information and reframing issues;
- advising the client of the law that applies;
- evaluating the merits of the client's case and giving the client an objective view of the likelihood of success on the merits if the matter proceeds to trial;
- reminding the client that 'merit' is only one matter that the client should be considering⁸⁷⁵ and encouraging the client to look at broader interests⁸⁷⁶ eg their 'social, psychological, and economic interests'⁸⁷⁷ and their relationship with the other party;

⁸⁷⁰ Ibid 531.

⁸⁷¹ Ibid.

⁸⁷² Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 409; Kovach, *Ethics for Whom?*, above n 28, 61.

⁸⁷³ Hardy and Rundle identify five different types of roles that lawyers might adopt ie 'absent advisor', 'advisor observer', 'expert contributor', 'supportive professional participant' and 'spokesperson': Hardy and Rundle, above n 6, 143. For discussion of the main tasks performed in discharging each role (and of the contributions that lawyers can make at each stage of the mediation process), see Hardy and Rundle, above n 6, 145-65.

⁸⁷⁴ Nolan-Haley, above n 6, 1376 (citations omitted).

⁸⁷⁵ Fox, above n 131, 45.

⁸⁷⁶ In the US, ABA Model Rules r 2.1 provides that '[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation'.

⁸⁷⁷ Stark, above n 113, 789.

- assisting the client to consider a range of process options;
- assessing the client's case for its suitability for mediation or other dispute resolution process;
- facilitating negotiations (or mediation) and attempting to settle if it is in the client's interests to do so; and
- generating and evaluating alternative options and solutions.⁸⁷⁸

In fact, the importance of some of these tasks is heightened in mediation. One of the primary tasks of legal representatives is to advise clients of their legal rights and obligations. This is a central task in every transaction undertaken by lawyers on behalf of clients. Nowhere is it more important than in mediation where the power of decision-making rests with the client (and there is no judge to ensure appropriate application of substantive law). Clients need to be in a position to make informed decisions. Lawyers are sometimes criticised for bringing law into mediation but if legal rights and obligations are involved, parties can benefit from an adversarial look at their position. 'A prediction of the likely results of adversary processing is necessary for an informed, fully voluntary decision about a mediated solution.'⁸⁷⁹

Lawyers can support and enhance the values of empowerment and self-determination in mediation by promoting informed consent. They can 'safeguard client voice,'⁸⁸⁰ and 'guide clients towards responsible decisionmaking'.⁸⁸¹

Legal representatives can also protect their clients against unfairness.⁸⁸² Most standards of conduct for mediators assume that mediators will take appropriate interventions to address a power imbalance between the parties but legal representatives are better placed to do so than mediators (for a mediator must try to preserve at least the appearance of impartiality).

⁸⁷⁸ Schneyer, above n 863, 27; Lawrence, above n 73, 443. If mediation is chosen by the parties, there are a range of matters which lawyers should attend to by way of preparation. See Wolski for discussion of pre-mediation tasks such as arranging the mediation, selecting a mediator, and preparing 'intake documents': Wolski, above n 15, 613-7. Also see Hardy and Rundle, above n 6, 116-24; 129-33.

⁸⁷⁹ Riskin, above n 333, 37. Also see Nolan-Haley, above n 6, 1385; Stark, above n 113, 789.

⁸⁸⁰ Nolan-Haley, above n 6, 1376-7; Abramson, above n 6, 120-1.

⁸⁸¹ Nolan-Haley, above n 6, 1376-7; Abramson, above n 6, 120-1.

⁸⁸² Craig A McEwen, Nancy H Rogers, and Richard J Maiman, 'Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation' (1994-1995) 79 *Minnesota Law Review* 1317, 1355.

Lawyers can protect their clients where necessary from any unfair bargaining advantage the other side may have.⁸⁸³

It may well be necessary and appropriate for legal representatives to monitor a mediator's use of power⁸⁸⁴ and to protect clients from the mediator.⁸⁸⁵ In particular, when dealing with an evaluative mediator, legal representatives may have to undertake the role of 'strategic intervener', anticipating and responding to the interventions of the mediator.⁸⁸⁶ Abramson suggests that the mediator's approach is one of the single most important factors impacting the role undertaken by legal representatives.

The mediator's orientation should be especially highlighted, because it can singularly shape an attorney's representation strategy. An attorney's entire approach to interacting with and enlisting assistance from the mediator will be influenced by the mediator's process management, that is, how problem-solving, transformative, or evaluative the mediator might be.⁸⁸⁷

Abramson suggests that attorneys be asked the following question: 'does knowing that the mediator might offer an evaluation influence how you would represent your client in mediation?'⁸⁸⁸ The answer, he says, is 'yes' every time.⁸⁸⁹

Stark also emphasises the importance of the lawyer's role in providing information and advice to clients in the context of evaluative mediation by referring to legal representatives as 'information maximizers' for clients in contrast to the evaluative mediator who is not an information maximizer. The mediator's advice to disputants is hedged by two significant constraints. 'First, the mediator must be concerned about maintaining the appearance of impartiality as between the parties'.⁸⁹⁰ The second 'more powerful constraint'⁸⁹¹ is that

⁸⁸³ Ibid 1361.

⁸⁸⁴ Shapira, above n 562, 537.

⁸⁸⁵ McEwen, Rogers, and Maiman, above n 882, 1361. Also see Bush, *Ethical Standards in Mediation*, above n 2, 254 who was concerned about abuse by the mediator. However, as Lande points out 'lawyers sometimes look to the mediators to provide precisely that kind of pressure on the lawyers' own clients that the lawyers feel unable or unwilling to effectively exert themselves': Lande, above n 1, 885 (citations omitted).

⁸⁸⁶ See generally, John H Wade, 'Strategic Interventions Used by Mediators, Facilitators and Conciliators (1994) 5 *Australian Dispute Resolution Journal* 292; Wade, above n 555. Also see Abramson, above n 6, 124-5 on the influence of an evaluative mediator on an attorney's mediation strategy.

⁸⁸⁷ Abramson, above n 6, 124.

⁸⁸⁸ Ibid 125.

⁸⁸⁹ Ibid.

⁸⁹⁰ Stark, above n 113, 789.

⁸⁹¹ Ibid.

evaluative mediators provide the parties with information and advice primarily in order to help them to close the gap between them – to help them integrate their claims.⁸⁹² Mediators ‘are loathe to provide legal information that *widens* the gap between the parties’⁸⁹³ or exacerbates differences.⁸⁹⁴ If this is the case, lawyers are needed to ensure that all relevant information is given to their clients. They do this best by acting as a partisan advocate for their client. Stark concludes that while the ‘adversarial/materialistic perspective’ of advocates has been criticised, ‘[y]et it is precisely the stance of partisanship that causes representative lawyers – advocates - to provide the fullest possible information to their clients’.⁸⁹⁵

This is not to say that lawyers perform exactly the same tasks in every representational context. Hyman argues that different tasks are involved in trial advocacy⁸⁹⁶ than in mediation. For instance, he notes that trial lawyers typically prepare a theory of the case ie the most plausible explanation for what occurred, in preparation for a trial, whereas they may not do so in mediation.⁸⁹⁷ Trial lawyers also exam and cross-examine witnesses at trial – clearly they do not do so in mediation. But every representation by a lawyer involves the performance of a core set of tasks; and the discharge of those tasks involves a core set of skills.

In carrying out the tasks involved in mediation (advising clients, evaluating the merits of the client’s case, assessing the likely litigated outcome etc), legal representatives use many of the same skills or skill sets as they use in other representational settings eg they use research and analysis skills; skills associated with factual investigation, selection, organisation and use; written and oral communication skills (and sub-skills such as those of active listening); negotiation skills and skills involved in problem-solving.⁸⁹⁸ Even Hyman concedes that there are ‘some precepts that apply with equal force to the accomplishment of good trial advocacy and to the creation of wise agreements’.⁸⁹⁹ ‘These include the need to pay very close attention to the facts, the ability to listen carefully and well, and a skill in building persuasive

⁸⁹² Ibid.

⁸⁹³ Ibid 790 (emphasis in original).

⁸⁹⁴ Ibid.

⁸⁹⁵ Ibid 793.

⁸⁹⁶ Hyman, above n 811, 867.

⁸⁹⁷ Ibid 864.

⁸⁹⁸ For a discussion of the skills required by competent lawyers, see Wolski, above n 15, 19-26. Also see Macfarlane, above n 862, 63, 68. It should be borne in mind that most lawyers engaged in representational work are not in fact trial advocates. When contentious issues arise between clients, their lawyers are more likely to negotiate than to litigate. Even trial lawyers spend more time negotiating than they do in court. This is evidenced by the number of matters which are settled short of a full trial: see references, above n 422.

⁸⁹⁹ Hyman, above n 811, 867.

conceptual frameworks that characterize the dispute and point to a mutually satisfactory resolution’.⁹⁰⁰

There are a number of commentators who argue that lawyers may need to modify their ‘standard philosophical map’⁹⁰¹ and to learn to live with feelings and ambiguity rather than rules of law and the certainty provided through legal methods and solutions⁹⁰² in order to be effective in facilitative mediation. The more moderate view, one which recognizes the value of the lawyer’s ‘standard philosophical map’ (if indeed there is one) is that lawyers may retain their standard orientation but enrich it⁹⁰³ by developing skills such as those associated with active listening, empathizing and creative problem-solving.⁹⁰⁴ This view also recognises that lawyers just as often are cooperative, as they are adversarial. As Linda Mulcahy notes:

Lawyers commonly operate in settings which are not strictly adversarial and even within contentious situations they perform a wide variety of functions in which the normal pattern of their work is facilitative. Thus, although solicitors are trained in adversarial techniques they are as likely to be conciliatory as combative in practice.⁹⁰⁵

Lawyers may need to expand their knowledge and extend their repertoire of skills in order to fulfil their roles in mediation. For example, Macfarlane claims that:

Conflict resolution advocacy also requires a certain amount of new knowledge, which can enhance the breadth and depth of the negotiator’s skills. For example, skillful negotiators understand the distinctive dynamics of both distributive (divide up the pie) and integrative (expand the pie, then divide it) negotiations as well as the need to move between these two modes depending on the type and stage of negotiation.⁹⁰⁶

⁹⁰⁰ Ibid 867-8.

⁹⁰¹ Caputo, above n 1, 90.

⁹⁰² Anne Ardagh and Guy Cumes, ‘Lawyers and Mediation: Beyond the Adversarial System?’ (1998) *Australasian Dispute Resolution Journal* 72, 74. The concept of a ‘lawyer’s standard philosophical map’ is attributable to Riskin. He reasoned that (most) lawyers’ view of the world is based on ‘two assumptions about matters that lawyers handle: (1) that disputants are adversaries – i.e., if one wins, the others must lose – and (2) that disputes may be resolved through application, by a third party, of some general rule of law’: Riskin, above n 333, 44.

⁹⁰³ Chris Guthrie, ‘The Lawyer’s Philosophical Map and the Disputant’s Perceptual Map: Impediments to Facilitative Mediation and Lawyering’ (2001) 6 *Harvard Negotiation Law Review* 145, 180.

⁹⁰⁴ Ibid 182.

⁹⁰⁵ Linda Mulcahy, ‘Can Leopards Change Their Spots? An Evaluation of the Role of Lawyers in Medical Negligence Mediation’ (2001) 8 *International Journal of the Legal Profession* 203, 215.

⁹⁰⁶ Macfarlane, above n 862, 70. Also see Guthrie, above n 903, 180-2.

I have argued previously that changes to the civil justice system including the emphasis now given to ADR, might require the development of new skills for lawyers and responsive changes to the law school curriculum. Legal educators have become increasingly aware that negotiation and settlement skills are central to legal practice⁹⁰⁷ and have taken some steps to integrate the teaching of these skills in the law school curriculum.⁹⁰⁸

But it is one thing to concede that lawyers may need new skills; it is another to say that their roles are different. Neither role (eg advising clients of their legal rights) nor duties (eg the duty of competence owed to clients) nor fundamental professional values (eg loyalty to clients) have changed with the advent of mediation and ADR. The responsibility to clients, the public responsibility to the justice system, the responsibility to the legal profession, and the responsibility to oneself - these professional values are just as relevant in mediation as they are in litigation. Since these are the values that underpin the existing rules of professional conduct, the rules are just as relevant and appropriate in mediation as they are in any other representational context.

4.4 Proposals with Respect to an Ethic of Care

Kovach has suggested that ‘an ethic of care’ provides an appropriate starting point for standards of conduct in mediation.⁹⁰⁹

In a lawyer-client relationship, the ethics of care⁹¹⁰ suggests that lawyers focus on the client and the client’s relationships with others and on non-legal as well as legal aspects of the client’s situation.⁹¹¹ Lawyers using this approach will focus on improving, or at least doing no harm to, the client’s relations with others. There is a place for such an ethic, to varying degrees, in all aspects of lawyering.

⁹⁰⁷ Macfarlane, above n 862, 61.

⁹⁰⁸ Wolski, above n 295, 225-8.

⁹⁰⁹ Kovach, *New Wine Requires New Wineskins*, above n 6, 966-8; Kovach, *Ethics for Whom?*, above n 28, 63. The concept of an ‘ethic of care’ is usually credited to Carol Gilligan: see Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press, 1982).

⁹¹⁰ Ross, above n 11, 45. Also see Charles Fried, ‘The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation’ (1976) 85 *Yale Law Journal* 1060.

⁹¹¹ Ross, above n 11, 39-40; Parker and Evans, above n 17, 34.

There is also a place for an ethic of care in some models of mediation. It is an approach which is most evident in the therapeutic or transformative model of mediation where mediators and parties are concerned with modifying behaviour and improving the pattern of interaction between the parties. It is not evident in all models of mediation and could not, without modification and much elaboration, be the basis for general rules of conduct with respect to mediation.

4.5 Summary and Review

In this part of the exegesis, I have critiqued a range of proposals for new rules of professional conduct for legal representatives in mediation and the rationale given for the need for new rules. I have endeavoured to show that the rationale (in three different approaches) is flawed. Each approach relies in part, or whole, on supposed similarities and differences between negotiation, mediation and litigation. Notwithstanding that these processes have a shared purpose (ie the peaceful resolution of disputes), proponents of the *negotiation is surrogate litigation* approach fail to take into account the fact that negotiation (and mediation) may bear no resemblance to litigation. Proponents of the *negotiation lacks due process controls* approach fail to account for the fact that participants who choose negotiation and mediation may do so because of the absence of rules and procedural formalities. Proponents of the third approach assert that the current professional conduct rules are based on an adversarial paradigm of legal practice and that lawyers undertake different roles in mediation than they do in litigation. At most, the rules may give more attention to advocacy in court, than they give to other roles and contexts in which lawyers are involved. Either way, the rules do not exclude or prohibit non-adversarial forms of practice. To the contrary, since the rules provide that lawyers should be honest, courteous and fair in their dealings with others, they tend to encourage cooperation. I have demonstrated that lawyers undertake the same roles in mediation as they do in litigation and other representational contexts: they counsel, advise, negotiate, advocate and draft a range of documents on behalf of their clients.

Most proposals for new rules suggest that higher standards of disclosure ought apply to legal representatives in mediation. They also call for the imposition of good faith participation requirements, a duty of cooperation and an (unspecified) duty of fairness. Additionally a few authors call for rules which require legal representatives in mediation to

use interest-based negotiation instead of positional negotiation and to act more like neutrals and less like partisan advocates. There are problems with every one of these proposals. The problems include:

- lack of consensus among proponents for change over the appropriate standard of disclosure required in mediation;
- lack of consensus over, and uncertainty attached to, the meaning of concepts such as good faith and cooperation;
- difficulty in articulating rules of this nature with any precision;
- the inevitable subjectivity and vagueness of rules of the kind proposed;
- difficulties of monitoring and enforcing compliance with rules of the kind proposed together with possible inroads which might be made into the confidentiality of the mediation process; and
- destruction of the informality and flexibility which are hallmarks of mediation.

Further rules of the kind proposed are unrealistic and undesirable for a variety of reasons, including the following:

- parties need partisan legal representation in mediation to protect and enhance self-determination and its underlying requirement of informed consent.
- every negotiation will involve some positional negotiation (and we should remember that it is not the unethical evil twin of interest-based negotiation);
- every negotiation benefits from some element of competition;
- every negotiator must choose, within the changing dynamics of negotiation, where they should be at any given moment in time on the 'tightropes of negotiation', treading a line between honesty and openness as against misrepresentation and non-disclosure and cooperation as against competition.

None of the proposals for new rules discussed in this part offers a workable realistic alternative to the current rule systems the legal profession has in place.

In chapter 3, I demonstrated that the critical differences between litigation, mediation and negotiation are the diversity of mediation; and the potential for influence by the mediator. These factors point to the desirability of retaining the existing rules of conduct which allow legal representatives to exercise discretion in relation to matters such as candour, cooperation

and the approach to negotiation that they adopt at any given moment in time; not to the introduction of new rules which reduce the flexibility and discretion allowed to lawyers.

This leads to the next part of the exegesis in which I explore a number of more general reasons for favouring the existing rules of professional conduct for legal representatives in mediation over the alternative ‘non-adversarial’ ethics systems which have been proposed.

PART 5: OTHER REASONS FOR RETAINING EXISTING RULE SYSTEMS

There are two general reasons for retaining the current professional rules of conduct for legal representatives in mediation (and for resisting the introduction of new ‘non-adversarial’ rules such as those discussed above).⁹¹² They are that:

1. The existing general rules are more appropriate than detailed rules for highly contextual processes such as mediation.
2. Legal representatives ought to be allowed scope to exercise discretion over certain ethical matters in mediation.

5.1 General Rules of Conduct Are More Appropriate for Mediation

A number of long-standing debates take place in the literature on the subject of professional rules or codes of conduct. The first debate concerns whether codes of conduct should be aspirational (hortatory) or regulatory (prescriptive or disciplinary) in nature. Aspirational codes lay down the aims and ideals for which practitioners should strive;⁹¹³ regulatory codes clarify ‘minimum expectations of acceptable behaviour’.⁹¹⁴

An hortatory code of ethics attempts to inspire members of the profession to a higher standard by articulating the general principles and underlying goals of the profession. A regulatory code, on the other hand, creates a minimum standard to which members of the professional will be held accountable through the use of rules, whether permissive or prohibitive.⁹¹⁵

⁹¹² Other arguments are raised in the literature eg Barrett thought the inseparability of ADR lawyers from non-ADR lawyers, with lawyers being free to move into and out of traditional and ADR practice forms, made the creation of separate ethical schemes for ADR practitioners ‘extremely problematic’: John Q Barrett, ‘A Post-Conference Reflection on Separate Ethical Aspirations for ADR’s Not-So-Separate Practitioners’ (1997) 38 *South Texas Law Review* 705, 707. Another problem is the lack of consensus among stakeholders regarding the standard of openness that should govern lawyers’ dealings with others: Hazard, above n 138, 193, 196.

⁹¹³ Leny E De Groot-Van Leeuwen and Wouter T De Groot, ‘Studying Codes of Conduct: A Descriptive Framework for Comparative Research’ (1998) 1 *Legal Ethics* 155, 162. Also see Nicola Higgs-Kleyn and Dimitri Kapelianis, ‘The Role of Professional Codes in Regulating Ethical Conduct’ (1999) 19 *Journal of Business Ethics* 363, 365; Norton, above n 161, 495; Menkel-Meadow, *Non-Adversarial Lawyering*, above n 2, 166; Kovach, *New Wine Requires New Wineskins*, above n 6, 960.

⁹¹⁴ De Groot-Van Leeuwen and De Groot, above n 913, 162.

⁹¹⁵ Margaret Ann Wilkinson, Christa Walker and Peter Mercer, ‘Do Codes of Ethics Actually Shape Legal Practice?’ (2000) 45 *McGill Law Journal* 645, 651. Also see De Groot-Van Leeuwen and De Groot, above n 913, 162; Higgs-Kleyn and Kapelianis, above n 913, 365; Norton, above n 161, 495; Menkel-Meadow, *Non-Adversarial Lawyering*, above n 2, 166; Kovach, *New Wine Requires New Wineskins*, above n 6, 960.

The first type of code tends to be non-binding in nature and difficult to enforce, while prescriptive norms tend to be binding and enforceable.⁹¹⁶

Each type of code has potential benefits and disadvantages. While aspirational codes ‘can foster pride and public respect for the profession’,⁹¹⁷ they are often criticised for being too general and for failing to provide sufficient guidance to practitioners as to how to act in particular situations.⁹¹⁸ Regulatory codes may provide more specific guidance and lead to more predictable behaviour but they suffer most from the problems of specificity mentioned below.

The second long-standing debate is as to whether codes should be general or specific in nature.⁹¹⁹ The two debates overlap for aspirational codes tend to be general, while regulatory codes tend to be more specific. Again, each type of code has benefits and disadvantages. ‘Formulating rules in general terms has advantages. It anticipates application of the rules to a diverse range of practice situations and offers desired flexibility. At the same time, however, such an approach creates problematic gaps in guidance’.⁹²⁰ On the other hand, ‘the more numerous and more specific the rules get, the less flexibility the lawyer has in choosing a permissible course of action’.⁹²¹ Complex rules are also difficult to communicate, remember, and enforce.⁹²²

Additionally it has been argued that the increased specificity associated with regulatory codes tends to inhibit ethical deliberation,⁹²³ encouraging mindless conformity to rules instead of ethical evaluation.⁹²⁴ For example, Haines argues that ‘the proliferation of rules decreases moral sensitivity and development, reduces flexibility, and discourages critical thinking. In effect, the lawyer enters a “simplified moral world” and becomes an

⁹¹⁶ De Groot-Van Leeuwen and De Groot, above n 913, 162.

⁹¹⁷ Wilkinson, Walker and Mercer, above n 915, 651.

⁹¹⁸ Ibid.

⁹¹⁹ Vincent R Johnson, ‘The Virtues and Limits of Codes in Legal Ethics’ (2000) 14 *Notre Dame Journal of Law, Ethics and Public Policy* 25, 41; Wilkinson, Walker and Mercer, above n 915, 652.

⁹²⁰ Hazard and Remus, above n 324, 773. For further discussion on the tension between generality and specificity in ethical rules, see Andrews, above n 29, 109-12; Wilkinson, Walker and Mercer, above n 915, 652; Johnson, above n 919, 40.

⁹²¹ Wilkinson, Walker and Mercer, above n 915, 652.

⁹²² Johnson, above n 919, 40. For arguments against detailed codes or rules of ethics, see Nicolson, above n 19, 67-8; Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, above n 2, 451.

⁹²³ Wilkinson, Walker and Mercer, above n 915, 652.

⁹²⁴ Nicolson, above n 19, 67-8.

“unreflective rule-follower”⁹²⁵. Loder argues that by following specific rules, ‘the lawyer is deprived of the opportunity to deliberate and choose the course of action that should be taken’.⁹²⁶

Even if one favours detailed prescriptive rules, it is widely agreed that codes of conduct are inherently limited. It is neither possible nor desirable to govern all lawyer behaviour with strictly formulated rules.⁹²⁷ It is not possible because of the inherent vagueness of language (and the difficulty of defining terms such as ‘honest’ and ‘fair’), the difficulty of predicting the complex range of ethical issues that lawyers may encounter,⁹²⁸ the difficulty of enforcement and simply because no worthwhile human endeavour is capable of being captured in rules. ‘[E]thics (for lawyers or anyone else) can never be captured, once and for all, in a set of prescribed rules that if followed, result in a life of respectability. No worthwhile human activity can be completely defined by a set of prescribed rules (roles of scripts).’⁹²⁹

In practice, in order to deal with the tension between the need for certainty, predictability and enforceability on the one hand and flexibility and scope for the exercise of discretion on the other, most codes contain both aspirational and regulatory provisions ie ‘they are a “mixed model” of ethical regulation that provides some specific and some suggestive ethical standards’.⁹³⁰ ‘The legal profession’s codes are a compromise between these possibilities, providing regulation for members and addressing a wider audience by articulating values.’⁹³¹

There are some criteria available for judging when general as opposed to specific rules should govern a particular situation. ‘If the general principles justifying a given rule are uncertain or unclear, or if multiple and possibly competing principles are operating, this may indicate that the conduct in question is inherently inappropriate for specific and especially

⁹²⁵ Haines, above n 77, 460 (citations omitted).

⁹²⁶ Loder, above n 631, 312; Joan Brockman, ‘The Use of Self-Regulation to Curb Discrimination and Sexual Harassment in the Legal Profession’ (1997) 35 *Osgoode Hall Law Journal* 209, 218-219.

⁹²⁷ See, eg, Boon and Levin, above n 2, 7; Giegerich, above n 29, 1336.

⁹²⁸ See Johnson, above n 919, 41; Wilkinson, Walker and Mercer, above n 915, 652.

⁹²⁹ Elkins, above n 37, 202.

⁹³⁰ Loder, above n 631, 312. It is said to be ‘exceedingly difficult to write an ethics code with just the right level of detail’: Johnson, above n 919, 40. Also see Theodore J Schneyer, ‘The Model Rules and Problems of Code Interpretation and Enforcement’ (1980) *American Bar Foundation Research Journal* 939, 939.

⁹³¹ Boon and Levin, above n 2, 7.

mandatory rule-making.⁹³² The nature of the arguments (presented in part 4) over concepts such as disclosure (and candour), good faith, fair dealing and cooperation suggest that these are not areas that are appropriate for rule-making beyond the establishment of minimum general standards. There is no agreement amongst scholars as to the standard of disclosure and ‘fairness’ appropriate in mediation beyond that needed to satisfy the requirements of substantive law. The meaning of concepts such as good faith and cooperation are unclear. Some matters – such as the approach to negotiation adopted by the parties and their legal representatives – should not be the subject of rules at all since one approach is not more ethical than another.

The case for retaining general rules of conduct such as those that currently exist, for negotiation and mediation, is strong. More rules in negotiation and mediation would freeze a standard of behaviour in place as ‘the only correct one’.⁹³³ It is impossible to provide a single formula – a single correct answer - for lawyers (and other negotiators) ‘to follow in order to achieve ethical and effective negotiation behaviour’.⁹³⁴ In negotiation, decision-making is contextual.

More than almost any other form of lawyer behaviour, the process of negotiation is varied; it differs from place to place and from subject matter to subject matter. It calls, therefore, either for quite different rules in different contexts or for rules stated only at a very high level of generality.⁹³⁵

Mediation is even more diverse than negotiation. It is also highly dynamic and fluid. In commenting on the difficulties of drafting a rule which requires truth-telling in mediation, Cooley argues that ‘the truth’ is more illusive in mediation than in other contexts, and that what is true for a party in mediation now (eg their risks, desires, BATNAs) may not be true in

⁹³² Loder, above n 631, 325. Loder seeks to provide some ‘preliminary methods and criteria which drafters might employ to determine when specific enforceable rules are preferable to suggestive statements of principle’: Loder, above n 631, 312.

⁹³³ Ibid 319.

⁹³⁴ Eyster, above n 623, 753.

⁹³⁵ White, above n 230, 927; Rosenberger, above n 273, 627; Burr, above n 202, 13. Even Menkel-Meadow raised a concern about whether it was possible or desirable to craft a set of universal behavioural exhortations in an area of behaviour which is ‘in fact quite context-dependent’: Carrie Menkel-Meadow, ‘Ethics, Morality and Professional Responsibility in Negotiation’ in Bernard and Garth, above n 3, 119, 122.

15 minutes from now as the parties continuously develop and share information and interact with the mediator.⁹³⁶

It is acknowledged that the current rules do not provide all the answers to the ethical dilemmas that may arise in mediation (as they do not provide all the answers for lawyers in litigation). There are gaps and generalities and there is scope for flexibility in interpretation and application of the rules. How should lawyers fill the gaps?

5.2 The Case for Discretion in Ethical Lawyering

There is no doubt that lawyers have to exercise some discretion in dealing with ethical dilemmas and in choosing which alternative and contradictory course of action is the better one to take. As Peppet notes, ‘any code will have gaps and ambiguities that require *some* sort of discretion’.⁹³⁷ Indeed, a number of ‘discretionary’ or contextual approaches to ethical decision-making in lawyering have emerged. They have emerged largely as a result of criticism of the ‘standard conception’ or ‘dominant approach’ to legal ethics.⁹³⁸ This approach is explained below.

The current rules of professional conduct are said to reflect a role-based approach to legal ethics (in the sense that they are derived from the roles played by lawyers in the justice system).⁹³⁹ The literature refers to two such approaches:

1. The adversarial advocacy approach⁹⁴⁰ (variously referred to as the ‘dominant approach’ or the standard or traditional conception of lawyers’ ethics).⁹⁴¹
2. The Public Interest or Responsible Lawyer approach.⁹⁴²

⁹³⁶ Cooley, above n 6, 274-5.

⁹³⁷ Peppet, above n 28, 507.

⁹³⁸ For a full discussion of the various approaches to legal ethics, see Wolski, above n 15, 93-111.

⁹³⁹ Parker and Evans, above n 17, 27; Wolski, above n 15, 109-110. In an adversary system of justice, ‘the parties are assigned the task of presenting their own cases and of challenging their opponent ... “The attorneys are their clients’ agents in [this] task. The duty of a lawyer in an adversary proceeding is therefore one-sided partisan zeal in advocating his or her client’s position”’: Wolski, above n 15, 97-98 quoting David Luban, ‘The Adversary System Excuse’, first published in David Luban, *The Good Lawyer: Lawyers’ Roles and Lawyers’ Ethics* (Rowman & Allanheld, 1984), republished in David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007) 27. For a discussion on ‘role’ differentiated behaviour, see Richard Wasserstrom, ‘Lawyers as Professionals: Some Moral Issues’ (1975) 5 *Human Rights* 1, 4. Also see Jolowicz, above n 346, 289; Parker and Evans, above n 17, 18.

⁹⁴⁰ Parker and Evans, above n 17, 14.

⁹⁴¹ See Parker and Evans, above n 17, 14; Peppet, above n 28, 499; William H Simon, *The Practice of Justice: A Theory of Lawyers’ Ethics* (Harvard University Press, 1998) 7; Boon and Levin, above n 2, 12.

⁹⁴² Simon, above n 941, 8-9; Parker and Evans, above n 17, 18.

The adversarial advocacy approach elevates loyalty to the client above all else (within the limits allowed by the law). It focuses on client-based values such as competence, confidentiality and loyalty to client. It legitimates ‘the lawyer in pursuing any arguably lawful goal of the client through any arguably lawful means’.⁹⁴³ It is from this approach that references to ‘extreme adversarial advocacy’ and ‘zealous adversarial advocacy’ derive.⁹⁴⁴ But some authors argue that this extreme approach has never represented the ethics of the profession (Schneyer asserts that ‘[t]he Standard Conception is really a *misconception*’)⁹⁴⁵ and that lawyers are required to and do behave ‘with all due fidelity to the court as well as the client’.⁹⁴⁶ Zacharias asserts that:

Suffice it to say that the common view that professional conduct requires lawyers always to act in an ultra-partisan, ultra-aggressive fashion simply is wrong. More importantly ... it is not necessary to trash existing professional standards to sanction tamer lawyering ‘in the public interest.’ The current codes already allow it.⁹⁴⁷

Professional conduct rules in Australian jurisdictions have never embraced the concept of zealous representation⁹⁴⁸ and even the rules in the US (which formerly used the terms ‘zeal’ and ‘zealous representation’) have been amended such that lawyers are now required to act with diligence rather than zeal.⁹⁴⁹

Lawyers using the second approach mentioned above moderate loyalty to clients by reference to their duties as officers of the court. They will, say Parker and Evans, act in accordance with the purpose of the law in the many grey areas where there are choices.⁹⁵⁰

⁹⁴³ Simon, above n 941, 8.

⁹⁴⁴ See Wolski, above n 15, 94-6 for further discussion of the two principles, that of partisanship and non-accountability, on which this approach is said to rest.

⁹⁴⁵ Schneyer, above n 635, 1569. Furthermore, Schneyer argues that ‘legal ethics is a much less coherent, and so a less controlling, body of rules and principles than the philosophers acknowledge; their Standard Conception is really only one, and never a completely dominant, strand of thought in a vague and sometimes contradictory field’: Schneyer, above n 635, 1543 (citations omitted). Generally see Schneyer, above n 635, 1531-2. Also see Hazard, above n 120, 379; Zacharias and Green, above n 636.

⁹⁴⁶ Zacharias and Green, above n 636, 5.

⁹⁴⁷ Zacharias, above n 850, 1942.

⁹⁴⁸ The professional conduct rules in Australian jurisdictions emphasise the interests of the client, not zealous advocacy. The same is true of the rules in the UK, see Boon and Levin, above n 2, 377.

⁹⁴⁹ The references to ‘zeal’ and ‘zealous representation’ were contained in Canon 7 of the Model Code of Professional Responsibility of 1969. They have not been removed altogether but have been moved to the comments section of r 1.3 of the ABA Model Rules.

⁹⁵⁰ Parker and Evans, above n 17, 25.

There is ‘evidence’ that ‘they often refrain from using every lawful means available to achieve their client’s ends’;⁹⁵¹ and that they will forgo hardball tactics because of regard for colleagues. Parker and Evans conclude that, in Australia and other common law countries, lawyers tend to focus on and balance the responsible lawyer ideal and the advocacy ideal.⁹⁵²

Both of these approaches have been criticised by William Simon. For Simon, ‘the critical fact’ is that both views (the Dominant and the Public Interest views), though with different priorities, ‘adopt a common style of decisionmaking’ that he calls ‘categorical’.⁹⁵³ He asserts that:

Such decisionmaking severely restricts the range of considerations the decisionmaker may take into account when she confronts a particular problem; a rigid rule dictates a particular response in the presence of a small number of factors. The decisionmaker has no discretion to consider factors that are not specified or to evaluate specified factors in ways other than those prescribed by the rule.⁹⁵⁴

Simon offers the ‘Contextual View’ as an alternative.⁹⁵⁵ He proposes that lawyers ‘should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice’⁹⁵⁶ where justice is determined on the basis of the legal merits of the matter at hand.⁹⁵⁷ His approach requires a consideration and weighing up of competing legal values.⁹⁵⁸

Like Simon, David Luban finds fault with the categorical nature of standard conceptions of legal ethics. According to Luban, the Dominant Approach ‘insists on categorical rules of zeal, confidentiality, and disinterestedness that drastically and wrongly pare back the scope of discretionary judgment’.⁹⁵⁹ He coined the phrase ‘moral activism’ for his approach which calls for lawyers to exercise discretion on the basis of their own moral values in ways

⁹⁵¹ Schneyer, above n 863, 16.

⁹⁵² Parker and Evans, above n 17, 27. Parker and Evans maintain that ‘existing professional conduct regulation attempts (at least half-heartedly) to put this [responsible lawyering] into practice’: 18.

⁹⁵³ Simon, above n 941, 9.

⁹⁵⁴ Ibid.

⁹⁵⁵ Ibid.

⁹⁵⁶ Ibid.

⁹⁵⁷ Simon, above n 941, 9-10. Peppet refers to this as a contextual approach to ethical problems: Peppet, above n 28, 505.

⁹⁵⁸ Peppet, above n 28, 505.

⁹⁵⁹ David Luban, ‘Reason and Passion in Legal Ethics’ (1999) 51 *Stanford Law Review* 873, 884. Also see discussion by Peppet, above n 28, 505.

‘calculated to best promote social and political justice.’⁹⁶⁰ The moral activist lawyer is concerned with promoting justice in the broad sense of the term (in contrast to the way in which Simon used the term ‘justice’).⁹⁶¹

Rhode suggests a somewhat different discretionary approach to legal ethics. She argues that lawyers should make decisions on the basis of broader societal interests. She maintains that they should be required:

to assess their obligations in light of all societal interests at issue in particular practice contexts. Client trust and confidentiality are entitled to weight, but they must be balanced against other equally important concerns. Lawyers also have responsibilities to prevent unnecessary harm to third parties, to promote a just and effective legal system, and to respect core values such as honesty, fairness, and good faith on which that system depends.

Rhode does not suggest that lawyers should breach the law or the rules of ethics – just the opposite – she maintains that lawyers should be guided by relevant legal authority and regulatory codes, for respect for the law is a fundamental value which lawyers have sworn to uphold. As Rhode points out, there is ample room for discretion allowed under most codes of lawyers’ conduct. ‘[M]ost ethical dilemmas arise in areas where the governing standards already leave significant room for discretion’.⁹⁶² This is true of the existing professional conduct rules. It would not be the case if more specific rules were adopted for legal representatives in mediation.

There are many points of difference between these three approaches (which respectively urge the exercise of discretion on the basis of legal merit, personal moral values and societal interests).⁹⁶³ Each of these theories has strengths and weaknesses which I have not elaborated

⁹⁶⁰ Parker and Evans, above n 17, 31. See David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007) 11.

⁹⁶¹ For further discussion on some of the differences and similarities of the views of Luban and Simon, see the discussion by Peppet, above n 28, 505-6.

⁹⁶² Deborah L Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford University Press, 2000) 67. For a recent articulation of the views of Professor Rhode, see Deborah Rhode, ‘Personal Integrity and Professional Ethics’ (Paper presented at the Third International Legal Ethics Conference, Gold Coast, Australia, 13-16 July 2008).

⁹⁶³ For a useful discussion of all of these approaches, see Peppet, above n 28, 504, 508, 511. Also see Robert F Cochran, Deborah L Rhode, Paul R Tremblay and Thomas L Shaffer, ‘Symposium: Client Counselling and Moral Responsibility’ (2002-2003) 30 *Pepperdine Law Review* 591.

upon here.⁹⁶⁴ Rather, I rely on what the approaches have in common. In each of these approaches to legal ethics, appropriate action (or inaction) on the lawyer's part is to be determined by reference to the circumstances of the particular case (not the dictates of ethical rules although as mentioned above, Rhode does not advocate that lawyers go outside the framework of the existing rules). In this sense, each approach allows lawyers to exercise some discretion in resolving ethical dilemmas. Each approach proposes a framework through which lawyers are encouraged to 'replace simplistic ethical decisionmaking with more thoughtful and complex deliberation of ethical considerations'.⁹⁶⁵

Discretionary approaches are not without problems or critics. Peppet criticises the discretionary approaches for their labour intensity.⁹⁶⁶ All discretionary approaches to ethics can be 'exhausting'. They require lawyers to take ethical dilemmas apart, translate them into legal values or personal values, weigh up alternative courses of action, and arrive at a justifiable conclusion. Peppet writes '[o]ne may wonder whether lawyers have the time, inclination, or ability to engage in the reasoning of moral philosophers'.⁹⁶⁷

Some of the discretionary approaches mentioned here (eg those of Simon and Luban) also cast practitioners adrift with too little guidance eg they leave 'the decision to the moral universe of individual practitioners'.⁹⁶⁸ Concepts such as legal merit and personal moral values are subjective and vague. With this in mind, Peppet criticises discretionary approaches for placing too little importance on positive legal ethics ie on the codes of practice themselves. 'The codes are of paramount importance in structuring attorneys' behaviour. Lawyers turn to the codes for guidance, and they want to be able to trust the codes when making complex decisions under conditions of uncertainty.'⁹⁶⁹

⁹⁶⁴ For a discussion of some of the advantages and disadvantages of the various approaches, see Parker and Evans, above n 17, 28, 31; Stephen Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities' (1986) *American Bar Foundation Research Journal* 613, 618; Wolski, above n 15, 102-108 (and the authorities cited therein).

⁹⁶⁵ Samuel J Levine, 'Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation (2003-2004) 37 *Indiana Law Review* 21, 24.

⁹⁶⁶ Peppet, above n 28, 506.

⁹⁶⁷ Ibid.

⁹⁶⁸ Wasserstrom, above n 939, 4.

⁹⁶⁹ Peppet, above n 28, 506.

Peppet does not believe that the codes of conduct should be abandoned. He proceeds on that basis that ‘we live in a pluralistic world, where consensus about complex moral and professional matters is unlikely’.⁹⁷⁰ (‘A code is necessary *because* we disagree’.)⁹⁷¹ He urges us to ‘use the codes to facilitate discretion, not use discretion to abandon the codes’.⁹⁷² On this point I agree with Peppet. We should use the framework of the existing rules because they encapsulate core values of the legal profession.

However, at this point, Peppet takes a different path to the one that I recommend for he maintains that ‘[n]o single, unified code of ethics can account for the diversity of legal practice that lawyers undertake’.⁹⁷³

5.3 Multiple Sets of Specialised Rules or One Set of General Rules

Peppet proposes that we replace the current system (under which the profession is regulated by one set of ethical rules that applies to all lawyers regardless of circumstance) with a system ‘in which lawyers and clients could contractually choose the ethical obligations under which they wanted to operate’.⁹⁷⁴ He refers to this as a contract model of legal ethics and he suggests that such an approach can be used to sort out the ‘sharpies’ from the ‘collaborators’ in negotiation.⁹⁷⁵ This reasoning underpins the concept and practice of collaborate law which is discussed in the next part of this exegesis.

Other approaches to the regulation of lawyers’ behaviour have been suggested, such approaches requiring something between the extremes of total discretion and observance of the general rules which currently govern the profession. For instance, Wilkins argues that it is not workable or desirable to delegate primary responsibility for ethical matters to individual practitioners.⁹⁷⁶ Such an approach he argues ‘underserves important values that must be a part of any viable system of professional regulation’.⁹⁷⁷ He suggests the concept of a set of ‘middle-level’ principles which recognises that context matters but ‘is not an invitation to

⁹⁷⁰ Ibid 518.

⁹⁷¹ Ibid 519.

⁹⁷² Ibid 507.

⁹⁷³ Ibid 503.

⁹⁷⁴ Ibid 475.

⁹⁷⁵ Peppet, above n 28, 507. Burr also makes this suggestion: Burr, above n 202, 13. This ‘sorting’ problem was first identified by William Simon: Simon, above n 941, 209.

⁹⁷⁶ David B Wilkins, ‘Legal Realism for Lawyers’ (1990-1991) 104 *Harvard Law Review* 468, 469.

⁹⁷⁷ Ibid 516.

adopt a purely case-by-case approach to professional ethics'.⁹⁷⁸ His approach is based on five broad categories: task (eg litigation versus counselling), subject matter (eg civil versus criminal), legal status of client (eg plaintiff versus defendant), lawyer status (eg sole practitioner versus large firm) and client status (eg individual versus corporate).⁹⁷⁹ There *has* been a trend towards the development of specialised rules of ethics for different areas of law.⁹⁸⁰ Rapoport relies on Wilkins' work to argue the case for a specialised federal law of bankruptcy ethics for bankruptcy lawyers in light of differences in state codes in the US and the peculiarities of bankruptcy law.⁹⁸¹ But neither of these authors suggest that any one of these factors alone – such as task or process – is sufficient to justify a separate code and in fact, Wilkins notes that the factors tend to be found in clusters eg lawyers who litigate divorces tend to practise alone or in small firms and to exclusively represent individuals.⁹⁸²

Kovach suggests that we should establish a code for negotiation, another for mediation, another for arbitration and so on with each code designed to improve the way in which the particular process operates. She maintains that '[d]ifferent types of representation often necessitate different roles, behaviour, skills, and conduct for the lawyer. Because ethical codes often set the parameters of such practices, they likewise must differ'.⁹⁸³

I have demonstrated in this research that the role (and values and duties) of lawyers does not change regardless of the dispute resolution process in which they are involved on behalf of clients. In any event, it would be impracticable to have different sets of rules as suggested by Kovach. Lawyer behaviours might be categorised by process as Kovach suggests. But it is equally as valid to argue that behaviour should be categorised by subject matter eg personal injury, commercial, family, public policy matters. It might then follow that we should establish a separate set of rules for family mediations, and another for personal injuries mediations, family arbitrations, commercial arbitrations and so. Of course, lawyers do not just act for clients in relation to one process. A lawyer will often simultaneously or sequentially represent a client in advice giving and counselling, negotiation, mediation and litigation. Lawyers would not be governed by one set of rules, but by many, and they would

⁹⁷⁸ Ibid.

⁹⁷⁹ Ibid 517. Also see Nancy B Rapoport, 'Our House, Our Rules: The Need for A Uniform Code of Bankruptcy Ethics' (1998) 6 *American Bankruptcy Institute Law Review* 45, 54.

⁹⁸⁰ Leubsdorf, above n 312, 959, 960.

⁹⁸¹ Rapoport, above n 979, 50.

⁹⁸² Wilkins, above n 976, 519. Wilkins uses tax practice as an example.

⁹⁸³ Kovach, *Plurality in Lawyering Roles*, above 9, 415. Also see Peppet, above n 28, 503.

be required to move from one set of rules to the next as they progress a client's case or to try to comply with multiple (and possibly inconsistent) sets of rules at the same time. This situation would be unworkable. Other authors have also criticised the approach, suggesting that we may end up with 'a grid of rules and roles that is too complex to be of practical use'.⁹⁸⁴

The preferred option is to have lawyers governed by one set of general rules that safeguards crucial professional values ie that maintains 'a commitment to systemic values'⁹⁸⁵ (values such as the promotion of the administration of justice, and competence, loyalty and confidentiality to clients), providing a general framework of rules from which appropriate conduct can be derived while allowing lawyers to respond to relevant contextual factors. The legal profession's current rules are sufficient and appropriate for this purpose.

5.4 Discretionary Matters – Foundations for the Exercise of Discretion

Assuming it is accepted that lawyers should exercise some discretion in relation to ethical matters (and it cannot be doubted that they have to exercise some discretion because there will always be gaps and uncertainties in the way the rules are interpreted and applied), the issues arise as to what matters are discretionary, and what factors legal representatives may take into account when exercising discretion. I suggest that legal representatives must:

1. Follow the instructions of their clients with respect to objectives, providing those objectives are legal. If clients want to secure the most favourable outcomes for themselves, lawyers should proceed in such a way as to meet those objectives (remembering that it will rarely be in the best interests of the client to take unfair advantage of the other party), subject to acting within the limits of the law. As mentioned in part 2, there is scope under the rules to decline to act for a client who wants to use mediation for an 'improper' purpose.
2. Decide for themselves (in consultation with clients) whether and to what extent they wish to use interest-based and other cooperative approaches to negotiation. This will involve making decisions about an overall negotiation strategy and about hundreds of

⁹⁸⁴ Schneyer, above n 863, 25.

⁹⁸⁵ This phrase is attributable to Wilkins, above n 976, 519.

individual tactical moves that go in to make up a negotiation (eg making decisions about whether to share information or conceal it, to describe wants accurately or inflate them, to make or reject offers, to make or reject concessions, and to give or withhold reasons for doing so). In some circumstances, a lawyer may decline to act for a client who insists on withholding information that the lawyer believes should be disclosed.

Legal representatives will adjust their strategy (with respect to matters such as candour and cooperation) to the actions of their counterpart and to those of the mediator. Lawyers will be particularly vigilant in their dealings with evaluative mediators. Many mediator tactics will lose their effectiveness if legal representatives know that they are being used. Without attempting to provide a book of strategies, legal representatives must ensure that clients are provided with information about their legal rights and obligations and ongoing advice about their options – even at the risk of widening the gap between the parties. They might also:

1. Counsel their clients to reveal information slowly (and to withhold some information altogether).
2. Speak on behalf of clients.
3. Ensure that clients have some control over the agenda including the number of issues, the order for discussion and the coupling and packaging of issues.
4. Recognise when mediators are steering clients in a particular direction with use of questions and intervene if necessary.
5. Intercede to introduce new focal points in the discussion and new options for settlement.
6. Ensure that all possible options are explored rather than allowing mediators to differentially create opportunities to discuss some options and not others.
7. Ensure clients are prepared to make concessions before they commit themselves.
8. Downplay the risks of not settling where the mediator has overemphasised them and played on the ‘fear-of-the alternative factor’ (ie put the negative consequences of failure to agree into perspective).
9. Reassure clients that they do not let anyone down, not least the mediator, if they do not settle today.
10. Ensure that clients are not pressured by time constraints, especially artificial ones.

11. Ensure that time deadlines are not used to force concessions and prevent further exploration of options.
12. Ensure clients are not exhausted and pressured into compromise by long sessions.
13. Call out a mediator who indicates impatience or disapproval, or even anger.
14. Negate the effect of long silences.
15. Ensure that mediators do not sidestep intractable differences or eliminate some issues altogether (if it is not in client's interests to do so).

Lawyers will also react to a range of contextual factors. As mediators choose their strategic interventions on the basis of a range of factors enumerated in part 4, so those factors will also impact on legal representatives. This includes factors such as the level of conflict between the parties, the level of sophistication of their client and so on. Of course lawyers may be proactive. If they decide to adopt a cooperate approach, they are wise to do so cautiously.

It is possible that different lawyers will arrive at different decisions when confronted with the same or similar ethical dilemmas. According to the literature, that does not matter providing each lawyer is able to justify their decision in the particular context.⁹⁸⁶

5.5 Summary and Review

This part has discussed two general reasons for retaining the current professional rules of conduct for legal representatives in mediation. First, the existing general rules are more appropriate than detailed rules for conduct in highly contextual processes such as mediation and second, lawyers ought to be allowed to exercise discretion over certain ethical matters in mediation. The matters over which they should retain discretion are the very ones which proponents for new rules seek to regulate (or more heavily regulate than is presently the case) - matters such candour and cooperation.

There is strong support for a discretionary approach to legal ethics. I have discussed three different discretionary approaches in this part of the exegesis. Each approach seeks to allow critical and reflective thinking and ethical deliberation on the part of lawyers. Such an

⁹⁸⁶ Loder, above n 631, 330.

approach is particularly apt for those aspects of practice where notions of what is right or wrong vary considerably and there are competing principles at play. It is suggested that issues such as candour, good faith, fair dealing and cooperation are not areas that are appropriate for rule-making beyond the establishment of minimum general standards. Practice in negotiation and mediation is contextual – more rules would freeze a single standard of behaviour in place when it is impossible to provide a single correct answer. Put simply, the answer will vary between each moment in time in each mediation.

But like Peppet, I do not believe that codes should be abandoned. The existing rules encapsulate core values of the profession and provide a framework from which lawyers may derive appropriate and ethical conduct. Unlike Kovach, I do not think we need multiple specialised codes for multiple processes. Such an approach would lead to the absurd situation where a lawyer would have to comply with multiple and possibly inconsistent codes at any one time.

Peppet's idea of a contractual model of legal ethics sounds promising. However, given our lack of ability to define appropriate terms in a single set of rules, one may be forgiven for doubting whether we have the capacity to draft and design a menu of codes. In the next part, I look at a dispute resolution practice that rests on a contractual model of legal ethics.

PART 6: COLLABORATIVE LAW: LESSONS LEARNED?

As was mentioned in part 2, parties sometimes enter into an agreement to mediate (or dispute resolution clause) under which they agree to participate in mediation in good faith and to cooperate with the mediator and with each other. Similar obligations may be imposed by statute. The effort to shape ethical obligations towards the non-adversarial end of the continuum has peaked with the development of a process known as collaborative law. It is a practice which demonstrates some of the problems which arise when participants are required to adopt so called 'non-adversarial' ethics standards.

6.1 Basic Features of Collaborative Law

Collaborative law (CL)⁹⁸⁷ is a dispute resolution process in which the parties and their lawyers⁹⁸⁸ explicitly agree to participate in negotiations in good faith and in a cooperative non-adversarial manner⁹⁸⁹ using interest based negotiation.⁹⁹⁰ They also agree to make full and honest disclosure of all relevant information.⁹⁹¹ Most importantly, the parties agree that if negotiations reach an impasse, the process is terminated and their lawyers are disqualified

⁹⁸⁷ Collaborative Law has been used primarily in family law disputes, but commentators claim that it is theoretically applicable to resolution of any dispute: Annable, above n 802, 160; Scott, above n 861, 221 (and according to Fairman, 'it has recently spread to all types of disputes': Fairman, above n 9, 505). It is claimed that it is practised 'in virtually every state and province in the United States and Canada, as well as overseas, particularly in Great Britain and Australia': Voegelé, Wray and Ousky, above n 282, 975. At the time of writing, Collaborative Law practices are operating in Victoria, New South Wales, Queensland, Western Australia and the Australian Capital Territory. For more information on the development of CL practices, see the International Academy of Collaborative Professionals (IACP), available at <http://www.collaborativepractice.com/>.

⁹⁸⁸ Since lawyers are indispensable to the CL process, it is entirely unavailable for a client whose 'opponent' is not legally represented: Beyer, above n 373, 337.

⁹⁸⁹ The parties agree that they will not have recourse to the courts while the process is ongoing. They agree to avoid even a threat of litigation throughout the negotiation process. If court intervention becomes necessary, it is by agreement: see Joshua Isaacs, 'A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law' (2004-2005) 18 *Georgetown Journal of Legal Ethics* 833, 834; William H Schwab, 'Collaborating Lawyering: A Closer Look at an Emerging Practice' (2003-2004) 4 *Pepperdine Dispute Resolution Law Journal* 351, 358; Annable, above n 802, 160; Pauline H Tesler, 'Collaborative Family Law' (2003-2004) 4 *Pepperdine Dispute Resolution Law Journal* 317, 328; Scott R Peppet, 'The Ethics of Collaborative Law' (2008) *Journal of Dispute Resolution* 131, 133; Voegelé, Wray and Ousky, above n 282, 1015.

⁹⁹⁰ For a general discussion about the practices and protocols of collaborative law, see Voegelé, Wray and Ousky, above n 282, 984.

⁹⁹¹ Beckwith and Slovin, above n 852, 499-500. Also see Christopher M Fairman, 'A Proposed Model Rule for Collaborative Law' (2005-2006) 21 *Ohio State Journal on Dispute Resolution* 73, 79; James K L Lawrence, 'Collaborative Lawyering: A New Development in Conflict Resolution' (2001-2002) 17 *Ohio State Journal on Dispute Resolution* 431, 436; Schneyer, above n 276, 296.

from continuing to act in the matter.⁹⁹² In essence, the lawyers are retained for the limited purpose of negotiating a settlement.⁹⁹³ Collaborative lawyers may also terminate the process if they believe that their client is not acting in ‘good faith’.⁹⁹⁴

CL negotiations are conducted via a series of four-way meetings held between the parties and their respective lawyers.⁹⁹⁵ The process does not involve a third party ‘facilitator’ such as a mediator, although the parties may include a mediation clause in their agreement ‘so that, in the event of an impasse, the parties mediate before going to court’.⁹⁹⁶

But for the disqualification provision, the participants (parties and lawyers) in CL agree to abide by the same obligations as proponents for new rules seek to impose on legal representatives in mediation. But the disqualification provision makes all the difference. It is considered the *sine qua non* of the CL process⁹⁹⁷ and ‘the real force’ behind it.⁹⁹⁸ It creates a powerful incentive for all concerned to try to reach agreement without litigation. In the event of impasse, the clients must engage new lawyers (at a new law firm) if they wish to commence legal proceedings and the collaborative lawyers each lose a client (although the lawyers may be recalled after litigation has commenced if the parties wish to attempt CL again).⁹⁹⁹

⁹⁹² The parties also agree to use joint experts. Absent agreement, those experts are disqualified from further involvement in the event that the matter proceeds to litigation: Isaacs, above n 989, 834; Schwab, above n 989, 360; Tesler, above n 989, 320.

⁹⁹³ See Fairman, above n 991, 73; Pauline H Tesler, ‘Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts’ [2008] *Journal of Dispute Resolution* 83, 87. In the US, the ABA Model Rules provide lawyers with the ability to limit the scope of their representation (see r 1.2(c)) but the restriction must be reasonable and the client must give informed consent to it. There is no reason to suppose that the position is any different in Australia. Generally see Brian Roberson, ‘Let’s Get Together: An Analysis of the Applicability of the Rules of Professional Conduct to Collaborative Law’ [2007] *Journal of Dispute Resolution* 255, 262, 264.

⁹⁹⁴ Schwab, above n 989, 358.

⁹⁹⁵ For a discussion of how these meetings unfold, see Beckwith and Slovin, above n 852, 499-500; Isaacs, above n 989, 835; Schwab, above n 989, 357; Wolski, above n 15, 657-8.

⁹⁹⁶ Hoffman, above n 52, 8. Also see Webb, who talks about bringing in a mediator ‘to add new energy to the process’: Stu Webb, ‘Collaborative Law: A Practitioner’s Perspective on its History and Current Practice’ (2008) 21 *Journal of the American Academy of Matrimonial Lawyers* 155, 163.

⁹⁹⁷ The disqualification requirement is consistently singled out as the unique and distinguishing characteristic of CL – it is the only dispute resolution process in which ‘withdrawal of counsel is required in the event of a failure to reach settlement’: Beckwith and Slovin, above n 852, 503. In fact all the professionals assisting the parties are ‘contractually barred from participating in litigation between the parties’: Tesler, above n 993, 87. Also see Schwab, above n 989, 358; Webb, above n 996, 168.

⁹⁹⁸ Fairman, above n 991, 80; Beckwith and Slovin, above n 852, 503.

⁹⁹⁹ Isaacs, above n 989, 834; Peppet, n 28, 490. Lawrence claims that if either lawyer continues to represent a client in subsequent litigation, the opposing party can enforce the terms of the agreement ‘in equity or by means of a motion to disqualify’: Lawrence, above n 991, 438.

By contracting away their right to continue their respective relationships into litigation, both the attorneys and clients have increased the stakes in the negotiation process and make a real commitment to settlement. This increased incentive to achieve settlement is ‘what sets collaborating lawyering apart from mediation.’¹⁰⁰⁰

The disqualification provision recognises that parties must lose something if they fail to cooperate, otherwise they will have no incentive to comply with provisions of this type.¹⁰⁰¹ In theory, concepts such as good faith participation are less abstract and potentially enforceable because of the disqualification provision.

According to some authors, the development of CL is a direct response to the adversarial culture of legal negotiation.¹⁰⁰² It offers the parties a way to change the context of negotiation from adversarial to collaborative. I suggest that CL has developed, at least in part, as a way to overcome difficulties inherent in provisions for complete candour, good faith participation and cooperation. However, as discussed later, the disqualification provision has caused major concerns and even with the provision in place, and presumably with the best of intentions by the parties (since they voluntarily enter into this arrangement) tensions between openness and non-disclosure, between cooperation and competition, and between the use of interest-based and positional negotiation continue to be felt.

There are other reasons for the development of CL. It appears to have developed in part as a way to secure the presence of clients and lawyers in negotiation.¹⁰⁰³ In some contexts (commercial matters are an example) negotiation often takes place without the parties being present.¹⁰⁰⁴ Conversely, in many jurisdictions and in many contexts¹⁰⁰⁵ lawyers are excluded from the mediation process.¹⁰⁰⁶ Consequently, they are not on hand to give ongoing real-time

¹⁰⁰⁰ Lawrence, above n 991, 438. Also see Isaacs, above n 989, 834; Tesler, above n 989, 320-1, 330.

¹⁰⁰¹ Peppet, above n 28, 479.

¹⁰⁰² Julie Macfarlane, ‘Experience of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project’ [2004] *Journal of Dispute Resolution* 179, 216. Also see Wolski, above n 15, 658-60 for a discussion of the reasons given for the development of CL.

¹⁰⁰³ Fairman, above n 991, 79.

¹⁰⁰⁴ The parties may also feel excluded in mediation when it is conducted entirely as a shuttle mediation.

¹⁰⁰⁵ Some statutory schemes give the mediator the power to determine whether or not legal representatives will be permitted: see, eg, r 326 of the *Uniform Civil Procedure Rules 1999* (Qld).

¹⁰⁰⁶ Generally, see Macfarlane, above n 1002, 215; Schwab, above n 989, 370; Fairman, above n 141, 318. There are other advantages claimed for CL. For instance, it is thought that ‘settlement only’ lawyers might focus more on settlement without the distractions of litigation. See, eg, William F Coyne, Jr, ‘The Case for Settlement Counsel’ (1998-1999) 14 *Ohio State Journal on Dispute Resolution* 367, 392-3.

legal advice to their clients as the negotiation ebbs and flows and reaches a conclusion.¹⁰⁰⁷ CL enables clients to be present and lawyers to ‘actively participate as negotiators and advisers for their clients’¹⁰⁰⁸ in the moment to obtain a better agreement.

I have read of no justification for removing the mediator from the negotiation context. What is clear though is that CL commits the parties and their lawyers to use of a very strict regime of four-way meetings. This is a uniform process over which the lawyers have absolute control and like all lawyer-to-lawyer negotiations, the process is highly ritualised. It is so ritualised that many clients apparently express frustration at the length of time it takes to get to substantive issues.¹⁰⁰⁹

6.2 Emerging Problems

A number of problems have already emerged in connection with Collaborative Law practice. These are explored below.

6.2.1 Contractual Confusion and A Possible Conflict of Interests

CL is a creation of contract. However, it is no longer practised according to a unified contractual model. Peppet examines a number of different contractual arrangements and associated documents. He finds that there are two types of documents involved in CL but many more contractual variations such that it is ‘almost impossible to achieve a uniform description of what Collaborative Law *is*’.¹⁰¹⁰ The two documents involved in the CL arrangement are:¹⁰¹¹

1. A Limited Retention Agreement (LRA) which is signed by each lawyer-client pair and provides for disqualification of the lawyers.

¹⁰⁰⁷ Hoffman, above n 52, 7. In addition, CL proponents also claim that mediation may be conducted too late when the matter is already well down on the litigation track: Cox and Matlock, above n 386, 47-8.

¹⁰⁰⁸ Isaacs, above n 989, 835. On the role of the lawyers at the four-way meetings, see Beckwith and Slovin, above n 852, 501.

¹⁰⁰⁹ Depending on the complexity of the case, there may be multiple four-way meetings to discuss process issues before substantive issues are considered: Macfarlane, above n 1002, 211; Schwab, above n 989, 377.

¹⁰¹⁰ Peppet, above n 989, 142.

¹⁰¹¹ Fairman, above n 991, 80; Hoffman, above n 52, 5; Wolski, above n 15, 654-7.

2. A Four-Way Agreement which is signed by clients and lawyers and which sets out agreed process guidelines for negotiation. Some of these documents are framed as unbinding statements of principle or belief. Some are clearly stated in contractual terms.¹⁰¹² Some Four-Way agreements may reiterate the mandatory lawyer withdrawal language found in the two separate LRAs (an arrangement which Peppet refers to as a Disqualification Four-Way). In some instances, the parties only sign a Disqualification Four-Way agreement ie there is no LRA between each lawyer-client pair (an arrangement which Peppet refers to as a Disqualification Four-Way Only).

The LRAs plus Disqualification Four-Way agreements (framed as hortative statements of principle) do not bring lawyers into contractual privity.¹⁰¹³ This is the original and most common structure for CL.¹⁰¹⁴ However, Peppet finds that most of the Disqualification Four-Way agreements do not deal clearly with the question of privity ie they are silent as to whether privity of contract is intended only between the clients, or also between the lawyers and between each lawyer and the opposing party.¹⁰¹⁵

Another alternative is for the parties to sign a Four-Way agreement which does not involve mandatory disqualification in the event of litigation and allows the lawyers to continue to represent the clients in litigation. This arrangement is now recognised as a separate practice, known as co-operative Law.¹⁰¹⁶

There have been at least seven ethics committee rulings in the US in relation to CL agreements.¹⁰¹⁷ According to Peppet, none of them address the diversity of contractual structures. Peppet focuses on the two most recent opinions, the Colorado Bar Association's Ethics Committee Formal Opinion 115 and the American Bar Association's Standing

¹⁰¹² Peppet, above n 989, 136.

¹⁰¹³ Peppet, above n 989, 136, 155.

¹⁰¹⁴ Ibid 134.

¹⁰¹⁵ Ibid 140.

¹⁰¹⁶ Peppet, above n 989, 135. This practice avoids potential problems associated with the disqualification agreement: see Isaacs, above n 989, 835; Hoffman, above n 52, 5; John Lande, 'Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering' (2003) 64 *Ohio State Law Journal* 1315. As Fairman describes Cooperative law, it is 'essentially collaborative law without the withdrawal provision': Fairman, above n 141, 248.

¹⁰¹⁷ See Peppet's discussion of these opinions: Peppet, above n 989, 142.

Committee on Ethics and Professionalism Formal Opinion 07-447.¹⁰¹⁸ In each case, the relevant committee made certain assumptions about the contractual arrangements involved in CL. The only opinion which held the CL arrangement to be ‘unethical’ in the sense of infringing the Model Rules of Professional Conduct was the Colorado Bar Association’s Ethics Committee Formal Opinion 115 which assumed a contractual, lawyer-privity, ‘disqualification four-way only’ structure (ie the committee assumed that each lawyer was in privity with the opposing client). Such an arrangement was held to impair the lawyer’s ability to represent his or her own client.¹⁰¹⁹ Peppet agrees that this arrangement creates a formal conflict of interest.¹⁰²⁰ In Peppet’s view, in order for CL to comply with the ethics rules it is necessary for the lawyer-client pairs to first execute a separate written LRA and it is best practice to limit the four way agreement to a ‘two-way’ agreement signed by the clients with the lawyers playing only a witnessing or affirming role.¹⁰²¹ What is clear from these discussions is that a lawyer cannot put the interests of the ‘other party’ before or even on a par with the interests of his or her own client.

A number of other concerns have been raised about CL.

6.2.2 Lack of Good Faith

The most obvious concern is that CL may be used to the detriment of the unwary. There is always a possibility that one of the parties and/or that party’s lawyer will not participate in good faith and will take advantage of the other party’s openness and good faith initiatives. Parties in collaborative law might be ‘falsely reassured by the collaborative agreement’s requirement that the parties engage in complete disclosure of all relevant information early in the process.’¹⁰²² Although the provisions of CL appear to level the playing field, ‘participants have no power to forcefully obtain discovery and other documents from less-than-forthcoming opposing parties.’¹⁰²³ There is ‘no consequence for non-compliance besides potential damage to the attorney’s reputation’.¹⁰²⁴ There is also the possibility of one client

¹⁰¹⁸ Peppet, above n 989, 143-4, 148; Beyer, above n 373, 325; Fairman, above n 141, 250-5, 263-7 for discussion of both ethics opinions. Also see Schneyer, above n 276, 315 who asserts that there is clear consensus that CL is not unethical per se.

¹⁰¹⁹ Peppet, above n 989, 143-4.

¹⁰²⁰ Peppet, above n 989, 145.

¹⁰²¹ Peppet, above n 989, 154, 160.

¹⁰²² Beyer, above n 373, 328.

¹⁰²³ Ibid.

¹⁰²⁴ Ibid 328-9.

deliberately and strategically forcing a process termination for the sole purpose of triggering the automatic disqualification provision so that both parties will need to engage new lawyers.¹⁰²⁵

Problems with interpretation, application and enforcement of good faith requirements persist.

Even if the parties try to bolster their intentions to act in good faith by expressly contracting, without elaboration, to negotiate ‘candidly and in good faith,’ the dynamics are unlikely to change, because these terms are open to a wide range of interpretations, breaches will be hard to detect, and enforcement efforts may provide no satisfactory remedy.¹⁰²⁶

6.2.3 Problems Relating to Disclosure

As demonstrated in the last section, CL has not resolved the tension between the extremes of full candour, misrepresentation and non-disclosure.¹⁰²⁷ The disclosure provisions require exchange of ‘relevant’ information. However, Macfarlane reports that there are wide differences in strategy adopted by various CL groups and different views as to what is relevant for the purpose of information exchange under the CL agreement.¹⁰²⁸ A lawyer who discloses everything and leaves nothing in reserve must know that he or she might compromise the client’s interests should settlement not be reached.¹⁰²⁹ As with mediation, while information and admissions revealed in CL are confidential, those matters are not protected if the dispute proceeds to litigation and they can be proven via completely independent formal discovery by subsequently retained lawyers.¹⁰³⁰

Is it permissible in CL to overstate one’s case and mislead about intentions to settle? There is some confusion in the literature about whether or not the standard set in rule 4.1 of the ABA Model Rules continues to apply in CL. Fairman asserts that ‘[a]bsent some intervening ethical guidance to the contrary, the same standard [rule 4.1] must apply to

¹⁰²⁵ Schwab, above n 989, 359.

¹⁰²⁶ Schneyer, above n 276, 327.

¹⁰²⁷ Macfarlane, above n 1002, 207; Beckwith and Slovin, above n 852, 501.

¹⁰²⁸ Macfarlane, above n 1002, 193.

¹⁰²⁹ Spain, above n 52, 169.

¹⁰³⁰ Collaborative Law Participation Agreement for General Legal Matters 2 (Collaborative Law Centre Inc 1999) quoted in Lawrence, above n 991, 436.

collaborative law’.¹⁰³¹ A different view is taken by Voegelé, Wray and Ousky who maintain that the tactics allowed under rule 4.1 are ‘not likely to be permitted’ in CL.¹⁰³²

In addition to ‘normal’ disclosure, the parties in CL agree to ‘provide good faith responses to any good faith questions and requests’.¹⁰³³ However, the CL agreement does not specifically address the parties’ obligations to disclose relevant information that has not been affirmatively requested by the other side (ie it does not address the question ‘do you have to ask for the information in order to be supplied with it?’). Nor does it address the question whether a lawyer (with whom a client has shared confidential information) has an obligation independent of obligations of the client to disclose all relevant information to the other side.¹⁰³⁴ Such an obligation would only exist, it is suggested, if a lawyer was in contractual privity with the opposing party.

6.2.4 Positional Negotiation v Interest-based Negotiation

The CL arrangement does not eliminate positional or distributive negotiation, nor does it eliminate adversarial behaviour. CL cases vary widely (as do all forms of dispute resolution). Hoffman notes that:

[i]n the paradigmatic CL negotiation, the parties and attorneys negotiate in four-way meetings, in a nonadversarial manner. In some CL cases, however, despite the parties’ and counsel’s best intentions, the negotiations can become so protracted, positional, and adversarial that they are virtually indistinguishable from ordinary negotiation in a high-conflict case.¹⁰³⁵

Even Webb, the founder of CL,¹⁰³⁶ concedes that distributive negotiations occur at the four way meetings.¹⁰³⁷ This is not surprising if one accepts that distributive negotiation occurs in most, if not all, negotiations.

¹⁰³¹ Fairman, above n 141, 269.

¹⁰³² Voegelé, Wray and Ousky, above n 282, 1019.

¹⁰³³ Lawrence, above n 991, 436. A good faith question is defined in the agreement as one that is ‘reasonably calculated to assist in assessing the merits and/or value of the party’s claim(s) or to otherwise further the process of reaching a settlement of all issues’: Collaborative Law Participation Agreement for General Legal Matters 2 (Collaborative Law Centre Inc, 1999) quoted in Lawrence, above n 991, 436.

¹⁰³⁴ Lawrence, above n 991, 444.

¹⁰³⁵ Hoffman, above n 52, 5.

¹⁰³⁶ Collaborative Law was the brain-child of Stuart Webb, a Minnesota family law practitioner, who in 1990 began experimenting with other trusted lawyers to settle family law matters through collaboration: Fairman, above n 991, 78.

6.2.5 Potential for Conflict of Interest – Coercion by Lawyers of Their Own Clients

In at least one contractual variation of CL (such as that considered by the Colorado Bar Association's Ethics Committee Formal Opinion 115 where there is contractual privity between a legal representative and the opposing client), there exists the possibility of a conflict between the interests of one's own client and those of the opposing party.

Whatever the contractual arrangements that are used, there is also a potential for conflict between a lawyer's interests and those of his or her own client and there is potential for a lawyer to coerce his or her own client.¹⁰³⁸ This might be true, to some degree, in all lawyer-client relationships but the stakes are higher in CL. If a settlement is not reached in CL, the collaborative lawyers are disqualified and each loses a client. In order to avoid having the process fail, a collaborative lawyer might exert undue pressure on a client to settle and he or she might recommend terms of settlement that do not truly represent the best interests of the client.¹⁰³⁹ Tesler suggests that the ability of lawyers to withdraw gives them 'more clout' over their client than a mediator who may encounter difficulty working with parties and maintaining neutrality.¹⁰⁴⁰ In other words, lawyers in this process carry a bigger stick with which to wave over clients than mediators do in mediation. The collaborative lawyer may no longer be fully representing the interests of the client¹⁰⁴¹ but rather he or she becomes an advocate for settlement as a matter of self interest.¹⁰⁴²

Not only might legal representatives in CL put their own interests before those of their client, there is concern that they might put the interests of opposing counsel ahead of the interests of their own clients.¹⁰⁴³ Some lawyers see their primary relationship to be with the lawyer on the other side, rather than with their client.¹⁰⁴⁴

¹⁰³⁷ Webb, above n 996, 162.

¹⁰³⁸ Schwab, above n 989, 359; Wolski, above n 15, 660-1.

¹⁰³⁹ Lawrence, above n 991, 433; Isaacs, above n 989, 838; Spain, above n 52, 172. In Issacs' view, the crux of the ethical issues in CL arises from the Collaborative lawyer's 'incentive to pressure parties into a settlement, creating a risk that counsel might not represent the best interest of the party when making a recommendation to accept a proposed settlement': Isaacs, above n 989, 838.

¹⁰⁴⁰ Tesler, above n 989, 329-30.

¹⁰⁴¹ Roberson, above n 993, 258.

¹⁰⁴² Isaacs, above n 989, 833.

¹⁰⁴³ Craver, above n 283, 341, 343. The fact is that often the other lawyer comes from the same practice group. Schneyer notes that members of CL practice groups 'might be too cozy and thereby create conflict of interest': Schneyer, above n 276, 332.

¹⁰⁴⁴ It appears that there are 'varying attitudes amongst collaborative law practitioners about precisely whom they serve': Roberson, above n 993, 257. Also see Spain, above n 52, 172.

6.2.6 Lack of Informed Consent by Clients

Technically, there is nothing unethical about the disqualification provision which underpins CL. Lawyers are permitted to enter into ‘limited purpose retainers’ provided the client gives informed consent.¹⁰⁴⁵ The lawyer must explain the limitations of his or her representation, the material risks involved in CL, the reasonably available alternatives and the probable impact of the limitation on the client’s rights and interests.¹⁰⁴⁶ Lawyers are also permitted to withdraw from a representation if they can do so ‘without material adverse effect on interests of the client’.¹⁰⁴⁷ However, clients may not fully understand what is at stake if the CL process is terminated. Most clients would expect their lawyer to continue to act for them until such time as the matter with regard to which instructions were given is completed. In CL, there is real potential for the parties to be trapped – to be committed to settle ‘out of necessity’.¹⁰⁴⁸ When a client has sunk as much as \$24,000 (US) in professional fees into the process and devoted some nine months to negotiation, it can be hard to call the process a ‘failure’ and to begin afresh with litigation with a new lawyer.¹⁰⁴⁹

6.2.7 An Artificial Practice Setting

CL depends for its ‘success’ on the organisational units which support the process. Collaborative lawyers signal their intention to collaborate by becoming members of CL practice groups (it is membership of this group which makes it easier to find ‘trustworthy’ and likeminded colleagues).¹⁰⁵⁰ It is this ‘tight-knit’ unit which allows the external ethical constraints on negotiation behaviour ie reputation effect and peer criticism, to work. However, the CL arrangement is not a realistic practice setting for most legal firms and practitioners. Craver asserts that collaborative lawyers ‘have created a wholly artificial world which is impossible to effectively monitor’.¹⁰⁵¹ These groups are so tight-knit that research on

¹⁰⁴⁵ Lawrence, above n 991, 443.

¹⁰⁴⁶ Spain, above n 52, 161.

¹⁰⁴⁷ Schwab, above n 989, 365.

¹⁰⁴⁸ Voegelé, Wray and Ousky, above n 282, 979.

¹⁰⁴⁹ Macfarlane, above n 1002, 200.

¹⁰⁵⁰ Schwab, above n 989, 362.

¹⁰⁵¹ Craver, above n 283, 339.

CL suggests that some clients are uncomfortable with the apparent friendliness of opposing lawyers.¹⁰⁵²

6.2.8 Inefficiency

Other concerns about CL relate to more practical matters (client dissatisfaction with the CL process, frustration at the length of time involved and duplication of legal fees if settlement is not reached).¹⁰⁵³ Beyer concludes that CL is ‘only a more expensive, longer, and less efficient process than the average mediated lawsuit, while accomplishing the same goal of the involved parties – settlement’.¹⁰⁵⁴

6.3 The Role of the Collaborative Lawyer: A Non-adversarial Advocate?

There are no specific ethical guidelines for CL contained in existing professional conduct rules although some commentators are calling for the development of new rules for this process.¹⁰⁵⁵ For instance, Fairman says that we may be able to ‘shoehorn the process of CL into traditional lawyer ethical codes,’ but he argues that it is an unsatisfactory way to proceed. We should not, he maintains, ‘put old ethical hats on new heads’.¹⁰⁵⁶ However there is no agreement that the practice of CL calls for the introduction of new rules.

One of the most controversial questions arising from CL practice is the question of whether or not the collaborative lawyer is still an advocate for his or her client. There has been some debate in the literature about the ‘appropriate’ ethical orientation of a collaborative lawyer. While Isaacs claims that the role of a collaborative lawyer is ‘not solely adversarial’,¹⁰⁵⁷ there is no agreement on how ‘non-adversarial’ a collaborative lawyer should be. Lawrence attempts to distinguish the orientation of traditional lawyers, lawyer mediators and collaborative lawyers as follows:

1. The ‘traditional advocate is committed first and foremost to the interests of the individual: the client.’¹⁰⁵⁸

¹⁰⁵² Macfarlane, above n 1002, 207.

¹⁰⁵³ Macfarlane, above n 1002, 200, 211; Schwab, above n 989, 377; Wolski, above n 15, 661.

¹⁰⁵⁴ Beyer, above n 373, 308.

¹⁰⁵⁵ Fairman, above n 9, 508. For discussion on a range of views on this matter, see Wolski, above n 15, 661-4.

¹⁰⁵⁶ Fairman, above n 9, 508.

¹⁰⁵⁷ Isaacs, above n 989, 841.

¹⁰⁵⁸ Lawrence, above n 991, 438.

2. Lawyers who serve as mediators are not advocates at all since they are not retained to advance the interest of a particular individual; rather they are retained to mediate a dispute.
3. The ethical orientation of the collaborative lawyer lies in between the divergent responsibilities of the advocate and mediator.¹⁰⁵⁹

Beckwith and Slovin strongly disagree with the view expressed by Lawrence and they disagree (although not so strongly) that we need new ethical hats. They argue that the collaborative lawyer does not function as a neutral (ie like a mediator), and that separate ethical rules for CL are not necessary. ‘The collaborative lawyer is, in every sense, an advocate. The ethical considerations applicable to traditional lawyering apply to collaborative lawyering equally, without need for alteration’.¹⁰⁶⁰ The CL format ‘does not diminish the zeal with which they [collaborative lawyers] represent their client’s interests’.¹⁰⁶¹ ‘The lawyer-advocate’s conduct in collaborative law is unlikely to differ significantly from that of the lawyer advocate in mediation. She continues to guard her client’s interest above all else. Her commitment is to her client and, by agreement, to the process.’¹⁰⁶² He or she does not represent the interests of the other party, but rather, the interests of his or her client, which might be best served by resolving the case without a court outcome.¹⁰⁶³ ‘The collaborative lawyer has not taken off his advocacy hat or donned the hat of neutrality’.¹⁰⁶⁴ What the collaborative lawyer foregoes is the positioning, posturing and puffing that many lawyers associate with effective advocacy.¹⁰⁶⁵

If this can be said of lawyers in a process where good faith, full disclosure and cooperation are explicitly agreed, surely there is no problem with a legal representative wearing his or her advocacy hat in mediation.

¹⁰⁵⁹ Lawrence, above n 991, 438-9.

¹⁰⁶⁰ Beckwith and Slovin, above n 852, 502.

¹⁰⁶¹ *Ibid* 498.

¹⁰⁶² *Ibid*.

¹⁰⁶³ *Ibid* 503.

¹⁰⁶⁴ *Ibid*.

¹⁰⁶⁵ *Ibid* 499.

Lande also believes that CL fits the general model of lawyering – he reasons that as ‘the general model of legal ethics clearly permits lawyers to act collaboratively’ so there is nothing incompatible with the two models.¹⁰⁶⁶ The current professional conduct rules give room for a cooperative, interest-based creative process. But ‘the [collaborative] lawyer should not forget that at the most fundamental level her client is involved in a legal matter, and that she is that client’s legal representative’.¹⁰⁶⁷ This same reasoning applies to the legal representative in mediation.

6.4 Summary

CL offers some important ‘learning points’ in the context of this research. In CL, problems of interpretation, application and enforcement of concepts such as full candour and good faith persist (or in some instances, have been sidestepped). It appears that these concepts are inevitably subjective and vague.

Although parties and their legal representatives may explicitly agree to honesty and full candour, and to the use of interest-based cooperative negotiation, as they do in CL, the tensions felt in negotiation between honesty and openness as against misrepresentation and non-disclosure, and between cooperation and competition, continue to be felt. These tightropes are inevitable in any negotiation. They cannot easily be fixed as points on a continuum.

When one attempts to impose a single right answer in conditions of uncertainty, there is real concern that lawyers might put their own interests in settlement and the interests of their collaborative-lawyer colleagues ahead of those of their own client.

¹⁰⁶⁶ John Lande, ‘Principles for Policymaking About Collaborative Law and Other ADR Processes’ (2006-2007) 22 *Ohio State Journal on Dispute Resolution* 619, 678. The same view is taken by Schneyer, above n 276, 305; and Peppet, above n 989, 147.

¹⁰⁶⁷ Peppet, above n 989, 147.

PART 7: RECOMMENDATIONS AND CONCLUSION

Lawyers who represent parties in mediation are likely to be confronted with a number of ethical dilemmas ie situations in which they have to choose between ‘competing and sometimes conflicting values’¹⁰⁶⁸ (such as loyalty to a client, as against furthering the interests of justice) and, as a consequence, between ‘alternative and contradictory courses of action’¹⁰⁶⁹ (such as keeping a client’s confidence, or disclosing material information to an opponent).

At present, legal representatives in mediation are governed by the legal profession’s general rules of conduct which make no specific provision for mediation other than, in the case of the rules in Australian jurisdictions, the ad hoc inclusion of the term ‘mediations’ in the definition of ‘court’.

Some authors, professional bodies and reform agencies are pressing for the promulgation of specific rules of conduct for legal representatives in mediation, rules which seek to regulate matters such as candour, good faith, cooperation and fairness. I contend that, not only are new ‘non-adversarial’ rules of conduct unnecessary, they are also impractical and undesirable.

7.1 The Current Position: Resolving the Dilemmas

In part 2, I identified five ethical issues which commonly confront legal representatives in mediation and suggested how those issues might be resolved using the current framework of law governing lawyers. The ethical issues considered are whether there are duties to make full and honest disclosure of relevant information, to act in good faith, to act cooperatively, to ensure fairness in process and/or outcome and, should these duties exist, which prevails in the event of conflict. Although this is not an exhaustive statement of the ethical issues which may arise, it provides a good sample of the most important dilemmas that legal representatives confront in mediation.

¹⁰⁶⁸ Fletcher, above n 24, 55.

¹⁰⁶⁹ Parker and Evans, above n 17, 10.

It is my contention that the ethical issues mentioned (and any others likely to arise) can be satisfactorily resolved through the application of the existing general rules of professional conduct for lawyers. Put another way, the current rules in Australian and US jurisdictions are compatible with, and adequate for, mediation. The existing rules are compatible with mediation if they do not destroy or detract from the essential nature and integrity of the mediation process. They do not. They are adequate for mediation if they provide appropriate minimum standards of conduct and a framework of values from which lawyers can derive appropriate conduct in a wide variety of circumstances including those likely to arise in mediation. They do.

As mentioned in part 5, the legal profession has struck a compromise in its rules of conduct between specific regulatory rules and general aspirational statements. The current rules of conduct for lawyers 'prescribe the minimum legally acceptable behavior, but encourage ethical conduct above and beyond the minimum.'¹⁰⁷⁰

The rules of professional conduct require lawyers to be honest in all of their dealings with the court and other persons (clients, opponents, and third parties including mediators). As to the application of the more specific rules governing disclosure, the situation in Australia is unclear. Currently, the professional conduct rules define 'court' to include 'mediations'. By this reference, I think that the drafters of the rules meant 'mediators'. If this is the case, then legal representatives in Australia are prohibited from knowingly making misleading statements about matters of law or fact to a mediator and they may even be prohibited from expressing certain opinions and from making certain (mis)representations about their client's settlement intentions and bottom lines. They must inform a mediator of any relevant binding authorities and legislative provisions of which they are aware although the rules are silent on whether such disclosures need to be made in joint sessions or whether disclosure in a separate session will suffice. Legal representatives have no obligation to disclose adverse facts to a mediator or to correct errors in statements made to the mediator by the other party.

¹⁰⁷⁰ Linda E Fisher, 'Truth as a Double-Edged Sword: Deception, Moral Paradox, and the Ethics of Advocacy' (1989) 14 *Journal of the Legal Profession* 89, 97-8.

In the US, the rules are more straightforward. Legal practitioners owe mediators the same standard of disclosure as they owe to their opponents.

In both Australia and the US, legal representatives are prohibited from knowingly making false statements about material facts or law to their opponents. If they make a statement to their opponent and subsequently discover that the statement is false (as Messrs Mullins and Garrett did), they must correct the statement. But, at least in their dealings with opponents, legal representatives can exaggerate values and bottom lines in mediation and they can misrepresent their client's settlement intentions. As a general rule, there is no obligation of candour owed to one's opponents in mediation. The rules of professional conduct do not prohibit 'silence', unwillingness to present a client's case and refusal to make a settlement offer. Nor is there any duty to assist the opponent in any way. As Timkin put it, there currently exists a silent safe harbour - absent court rule, principle of substantive law, or prior factual representation, a legal representative is not subject to a duty to make affirmative factual representations in the course of settlement negotiations.¹⁰⁷¹

The professional conduct rules do not impose on legal representatives, duties to participate in mediation in good faith or to cooperate with a mediator or an opponent in mediation. Nor does it appear that these duties exist in general law (at least, the law in this regard is not settled).

Some agreements to mediate and statutory directives to mediate impose upon participants (parties and legal representatives) an obligation to participate in good faith and to cooperate with the mediator. While some common threads as to the meaning of these provisions have emerged (eg it is widely agreed that a party who does not attend a mediation fails to participate in good faith; and it appears that a practitioner who defers mediation contrary to court directive may be held to have acted inconsistently with his or her duty to assist the court in the management of proceedings),¹⁰⁷² there is no universally agreed meaning that can be attributed to these terms.

¹⁰⁷¹ Temkin, above n 236, 181.

¹⁰⁷² *Hopeshore Pty Limited v Melroad Equipment Pty Limited* [2004] FCA 1445 (9 November 2004) [34].

The professional conduct rules require practitioners to act fairly, but in the context of mediation, it is suggested that practitioners discharge their duty of fairness with respect to process by complying with 'reasonable' guidelines set by the mediator.

There is no general duty to ensure fair outcomes or to protect the interests of third parties although some areas of substantive law impose specific obligations in this regard (eg family law). In rare cases a lawyer's actions in securing an agreement might be considered so unfair as to amount to a breach of the practitioner's obligations to the administration of justice and to the court. Such an agreement might also be contrary to the principles of contract law and the law dealing with unconscionability.

For the most part, legal representatives in mediation can decide for themselves the manner in which they conduct themselves in mediation (in the sense of choosing their preferred style and approach to negotiation) but, with some exceptions, they are bound to follow their clients' instructions with respect to the objectives of mediation and as to whether or not to disclose confidential information.

Presently neither the law of lawyering nor any rule of custom requires lawyers (or their clients) to use interest-based negotiation (nor is there any prohibition on lawyers acting competitively rather than cooperatively).

But while the rules do not mandate full candour, good faith participation, cooperation and outcome fairness, nor do they prohibit legal representatives, subject always to a client's instructions, from:

1. Being candid, in particular, from revealing the client's interests.
2. Presenting the client's case.
3. Making offers, and giving reasons for refusing offers.
4. Assisting mediators and other parties.
5. Cooperating with mediators and other parties to the mediation.
6. Acting in good faith.
7. Using interest-based negotiation.
8. Working towards 'fair' outcomes.

The existing professional conduct rules enable lawyers to cooperate, collaborate and use joint problem-solving methods, in the appropriate circumstances.

The rules do not excuse rudeness or discourtesy – rather, they impose upon legal representatives general obligations to treat others with civility or courtesy. Courts have affirmed that these general concepts can and will be applied and given meaning but also, that the meaning will be construed according to the context in which specific behaviour takes place.¹⁰⁷³ This approach is appropriate in the case of mediation which is a highly contextual process.

The rules do not encourage bad faith participation in mediation. A lawyer does not act in bad faith when he or she takes refuge in the ‘silent safe harbour’ mentioned above. While commentators have been unable to define with clarity what the term ‘good faith’ means or requires by way of participation, there is broad agreement that it does not require parties to engage in total disclosure, to make any or any particular settlement offers, or to give reasons for refusing an offer. Good faith does not preclude the parties from having regard to self-interest. Lawyers may act in the best interests of their clients consistently with ‘good faith’ obligations.

There will always be exceptions to these general mandates. There is scope for a legal representative to withdraw from a mediation and to cease to act for a client if the client will not agree to reveal critical information to the other side. Likewise, if a lawyer feels that a client is using mediation for an improper purpose, there is scope within the context of the existing rule system for the lawyer to refuse to act for the client on the ground that to do so would involve a breach of the lawyer’s duty to the administration of justice. There is ample case law to the effect that lawyers are not mere mouthpieces for their clients (whether in litigation or any other context) and must exercise independent judgment in matters such as these.¹⁰⁷⁴

¹⁰⁷³ *Lander v Council of the Law Society of the Australian Capital Territory* [2009] ACTSC 117 (unreported 11th Sept 2009) (Higgins CJ, Gray and Refshauge JJ) [43].

¹⁰⁷⁴ See, eg, the tribunal’s decision in *Legal Practitioners Complaints Committee and Fleming* [2006] WASAT 352 (7 December 2006) [70]-[71].

The rules of professional conduct mandate that legal representatives put the interests of their clients before those of other persons. The only duty that supersedes the duty to the client is the duty owed to the administration of justice.

Nothing about mediation requires that a legal representative put the interests of the other party or the interests of the mediator or 'the integrity of the process' before the interests of his or her client. Moreover, it is suggested that:

1. By putting client interests first, legal representatives actually further the one objective and value of mediation that seems to be universally recognised and consistent with every model of mediation – ie party self-determination.
2. A practitioner who participates in mediation in bad faith (whatever that means) breaches the existing rules of professional conduct for he or she does their client a disservice by not taking advantage of the potential benefits of mediation and the opportunity afforded to reach mutually satisfactory outcomes.

7.2 Problems with Proposed Alternative Ethics Systems

A range of proposals for new rules was addressed in part 4. Some influential authors and law reform agencies suggest that participants in mediation should owe a higher standard of disclosure, a duty to participate in good faith, a duty of cooperation and an (unspecified) duty of fairness. Additionally, several authors suggest that legal representatives in mediation should adopt an interest-based approach to negotiation and act more like neutrals and less like adversarial advocates.

7.2.1 Flawed Assumptions

I have argued that the rationale given for the need for new rules is flawed. It is by no means clear that the existing rules are based solely on an adversarial model of legal practice. At most, they may give undue attention to advocacy in court. They allow cooperative behaviour by lawyers in a range of contexts (given that most disputes involving lawyers do

settle, it is reasonable to assume that lawyers can and do cooperate with each other most of the time).

Additionally, to the extent that one can make general claims about the objectives and values of mediation and litigation, they are more alike than acknowledged by authors calling for change. The objective of each process is dispute resolution by a process considered to be fair where procedural fairness is judged by whether or not the parties are offered a meaningful opportunity for voice, ‘assurance that a third party considered what they said, and treatment that is both even-handed and dignified’.¹⁰⁷⁵

I have also argued that legal representatives in mediation continue to act as advisers, counsellors, negotiators and advocates for their clients. Arguably some of these roles eg those of adviser and counsellor, are more important in mediation than in any other context for in mediation, responsibility for decision-making rests with the parties.

None of the suggested alternative ethics systems present realistic, practical or desirable alternatives to the existing framework of rules governing the conduct of legal representatives in mediation. As argued in part 4, there are many problems with the proposals for new rules. I mention below some of the more significant problems.

7.2.2 Lack of Consensus, and of Clarity, About the Meaning of Terms

There is no consensus among proponents for change about the appropriate standard of disclosure required in mediation. This is not really surprising since negotiation literature recognizes that the question of how much candour to exhibit is ‘one of the most difficult normative questions with which negotiators wrestle’.¹⁰⁷⁶ How then can a single right answer to this question be captured or prescribed in the rules?

There is also a lack of consensus over, and uncertainty attached to, the meaning of concepts such as good faith and cooperation. These concepts have not been clearly defined, either by legislation, the courts or commentators in this area. Indeed, the court acknowledges

¹⁰⁷⁵ Welsh, above n 651, 185.

¹⁰⁷⁶ Korobkin, above n 814, 1816.

that these concepts are contextual – what they signify ‘in any particular context ... will depend on that context.’¹⁰⁷⁷

Proponents for new rules are vague about the criteria to be used for judging fairness. Again, this is not surprising since there are a number of different and competing criteria which may be used to judge outcome fairness in negotiation such as ‘equality, need, generosity, and equity.’¹⁰⁷⁸ Each party (and the mediator) is likely to have a different perception about what is fair.

Rules of the kind suggested are difficult to articulate with any precision; they are inevitably subjective and vague. It is impossible to communicate what is and what is not, appropriate behaviour.

7.2.3 Difficulties of Monitoring and Enforcing Suggested Rules

Some authors assert that rules must be enforceable enough, whether by formal or informal means, to promote confidence that they will be followed.¹⁰⁷⁹ Not only are we unable to define concepts such as ‘good faith’ and ‘cooperation’, we cannot monitor and enforce compliance with such terms. Even the court has observed that there are few meaningful sanctions available to it to penalise anyone who ‘breaches’ this type of obligation.¹⁰⁸⁰ Mediators in private mediations have even less power than the court to sanction for breach.

Any attempt to monitor and enforce compliance with provisions of this type will also involve inroads into the confidentiality of the mediation process – which is often considered one of the more beneficial features of the process.

7.2.4 Erosion of Other Hallmarks of the Mediation Process

Mediation has the potential to offer the parties both informality and flexibility in the way they resolve disputes. Currently there are few rules of process and procedure, except those

¹⁰⁷⁷ *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177 (3 July 2009) [70] (Allsop P with whom Ipp JA and Macfarlan JA agreed).

¹⁰⁷⁸ Welsh, *Perceptions of Fairness*, above n 385, 165.

¹⁰⁷⁹ Schneyer, above n 276, 329.

¹⁰⁸⁰ *Hopeshore Pty Limited v Melroad Equipment Pty Limited* [2004] FCA 1445 (9 November 2004) [38].

‘suggested’ by mediators and agreed to by the parties. If more rules are imposed, as proponents for change suggest, the informality and flexibility of the process (the reasons why many parties choose the process to begin with) will be lost.

7.2.5 Unrealistic Approach to Negotiation and Mediation

Proponents for new rules ignore some aspects of the theory and practice of negotiation, such as that:

1. Some deception is not only inevitable but vital to the effectiveness of negotiation.
2. Some competition and even adversarial behaviour is inevitable and desirable in negotiation.
3. Most negotiations do not have the potential to be conducted, from beginning to end, using interest-based negotiation.

In negotiation theory, ‘there is little or no consensus on whether a negotiator should pursue a competitive or an accommodative approach when dealing with the other party’.¹⁰⁸¹ A strategy of cooperation (and full candour) is not always appropriate. Every negotiation – even those which are predominantly interest-based, may benefit from some element of competition and adversarial behaviour. No one approach is always the best and most negotiations (and mediations) will involve a mix of approaches. As such, it is not appropriate to formulate codes of conduct which seek to freeze one approach in place, or to assume that one approach is better or more appropriate than another.

7.2.6 Other Problems

Proponents for change have not dealt with some of the possible negative consequences of new rules, such as:

1. A rule which mandates ‘candour’ would eventually make inroads into the scope of lawyer-client confidentiality. Clients might then not feel free to make full disclosure to their lawyers.

¹⁰⁸¹ Gifford, above n 258, 42. Gifford observed that there was no consensus on this issue amongst legal negotiation theorists.

2. A rule which mandates 'candour' might also remove the incentive to prepare for mediation. If the other party is obliged to reveal everything within its knowledge, each party might come to rely on the efforts made by the other side.
3. Rules of the kind suggested, which would be imposed only on lawyers, would disadvantage anyone who chose to be represented as against parties who conduct their matters pro se.

Those authors who call for multiple sets of rules have not considered the fact that, under such a scheme, lawyers may find themselves governed by several sets of, possibly conflicting, rules at any one time.

7.2.7 The Problems with Explicit Obligations

In private mediations, parties and their representatives have the opportunity to agree to, and make explicit, conduct obligations. The freedom to shape 'rules of engagement' has resulted in the development of collaborative law. This process affords us an insight into a situation where all participants agree to abide by obligations of good faith, full and open disclosure and non-adversarial behaviour. Since these terms are basically unenforceable without some inbuilt compliance and enforcement mechanism, the automatic disqualification provision has been adopted. It has resulted in the development of some critical ethical and practical problems ie the potential for conflict between the interests of the lawyer and his or her own client and the real potential (and incentive) for coercion of one's own client to get a result and to forge and maintain a relationship with the opposing lawyer. The least of its problems may be that the practice of collaborative law requires what is for many practitioners, an artificial practice environment. Even in this artificial environment, the tightropes of negotiation identified by Rubin continue to exist.

7.3 The Negotiation Tightropes – A Need for Discretion in All Negotiations

Ultimately, every negotiation will involve a number of tensions or tightropes along which negotiators must traverse. Every negotiator must choose, within the changing dynamics of negotiation, where they should be on a particular tightrope at any given moment in time. They must tread a line between honesty and openness as against misrepresentation and non-

disclosure and between cooperation as against competition. Rules (and rule drafters) cannot dictate how open or trusting a negotiator should be; they cannot dictate how cooperative or competitive a negotiator should be. Nor can they dictate whether interest-based or positional negotiation will be the more appropriate approach at any given moment in time.

In areas in which there is so little agreement on what is the right or best thing to do, it would be a mistake to impose upon lawyers rules which mandated full candour, good faith, and a requirement to cooperate or to use interest-based negotiation.

Ultimately the type of behaviour that commentators for change seek to regulate is inherently inappropriate for specific and especially mandatory rulemaking.¹⁰⁸² This reasoning applies to unassisted and assisted negotiation.

7.4 Factors Unique to Mediation

Authors who have called for new rules have focused on an ideal (possibly, mythical) version of mediation – in which mediators practise mediation in a uniform way (hovering around a facilitative approach), without their own agenda. They ignore two critical connected factors which distinguish mediation on the one hand, from litigation and unassisted negotiation on the other. These factors can and do have an impact on the behaviour and the ethics of legal representatives in mediation. The two factors are:

1. *The diversity of mediation.* Mediation is an extremely diverse process. There is little consensus about the proper objectives and values of mediation (so much so that it is difficult to make generalised statements about its objectives and values). Ultimately the objectives and values of mediation depend on the choices made by individual mediators.
2. *The influence of mediators.* While mediation has some core features, it consists of multiple variable features. It is no exaggeration to conclude that the single most important variable in mediation is the mediator, whose neutrality is either fictional¹⁰⁸³ or modified, as he or she sees fit, to deal with any perceived imbalance in negotiations

¹⁰⁸² Loder, above n 631, 325.

¹⁰⁸³ Coben, above n 534, 73.

and power to ensure outcomes which the mediator considers to be fair. Mediator standards allow mediators wide discretion in handling ethical matters - they may make judgments that are contextualized, 'guided by the particulars, the substance, and the context'.¹⁰⁸⁴

The one objective and value of mediation that is consistent across mediation practice is party self-determination – it is central to all models of mediation. In mediation, the parties retain decision-making responsibility. I agree with the many authors who argue that we must preserve the uniqueness of mediation ie we must preserve those things which set it apart as a separate, viable alternative to adjudication.¹⁰⁸⁵ And I agree with Weckstein that '[t]he challenge is to construct and conduct a mediation that maximizes disputant determination and avoids mediator coercion and uninformed disputants.'¹⁰⁸⁶ There is no better way to do this than to give each of the parties a partisan advocate who is obliged to ensure that his or her particular client is fully informed and as free as possible from coercion, including coercion exerted by the mediator, to make their own decisions.

A lawyer remains an advocate for his or her client at all times. He or she does not take on a neutral or non-partisan role in mediation. But advocacy does not mean adopting dominating 'hard-nose, uncooperative'¹⁰⁸⁷ tactics for to do so may often harm rather than help a client in mediation.¹⁰⁸⁸ It does not mean minimising the client's direct participation, or focusing exclusively on legal rights – where to do so ill serves the client's interests. In order to serve their clients' interests, lawyers should encourage their clients to play an active role in mediation; they should encourage their clients to engage in direct communication with the mediator and the other party, and they should allow the discussion to focus on emotional as well as legal matters.¹⁰⁸⁹

In some mediations some of the time (perhaps even, most of the time), it will be in their client's best interests to use interest-based negotiation and to cooperate. It will be in the client's best interests to reveal sufficient information (about interests but not necessarily bottom lines) to ensure that mediation is fruitful.

¹⁰⁸⁴ MacFarlane, above n 31, 62.

¹⁰⁸⁵ Kovach, *Good Faith in Mediation*, above n 8, 581; Sternlight, above n 757, 279.

¹⁰⁸⁶ Weckstein, above n 42, 502.

¹⁰⁸⁷ Sternlight, above n 757, 271.

¹⁰⁸⁸ Ibid.

¹⁰⁸⁹ Ibid 274-5.

At other times, positional negotiation will be the better choice of approaches to negotiation. It will not always be in the client's best interests to cooperate fully or to lay all of their cards on the negotiation table. A wise negotiator will 'proceed cautiously, revealing as little and defending as much as possible until the other's intentions are known.'¹⁰⁹⁰ Nor will it always be in the client's best interests for his or her representative to take a back seat in the mediation. '[I]n certain cases attorneys must play a very active or even dominant role in the mediation in order to protect their clients from being tricked, abused, or taken advantage of in the mediation process'.¹⁰⁹¹

The one prescription that lawyers should follow is this: '[t]hey should work with their clients to choose an approach which best serves their clients' needs and interests in the particular dispute'.¹⁰⁹² In order to do this, lawyers must be able to react to (and if necessary, be proactive about) mediator interventions. They also need the ability to respond to the actions of the other party. They need to exercise discretion in relation to matters such as candour, and with respect to all of the countless negotiation moves that make up 'cooperation' in negotiation. The matters over which they should retain discretion are those matters which proponents for new rules seek to regulate (or more heavily regulate than is presently the case).

7.5 Recommendations for Change

In my opinion, the legal profession does not need new rules of conduct to govern the behaviour of its members when they are acting on behalf of clients in mediation. (I do not speak to the need for new rules for lawyer mediators. Mediators stand in an entirely different position than legal representatives for they do not represent the interests of any one client.) I advocate resistance to any attempts to introduce rules which mandate requirements such as full candour, good faith and cooperation. Provisions of this nature are not even appropriate as aspirational statements as they assume that one approach is better, more appropriate and more ethical than another, when it is not.

¹⁰⁹⁰ Condlin, above n 105, 9.

¹⁰⁹¹ Sternlight, above n 757, 275.

¹⁰⁹² Ibid 271 (citations omitted).

However, the rules in Australia could be improved. I make some recommendations in this regard below.

7.5.1 Finetuning the Rules

Currently, the professional conduct rules in Australia do not contain explicit statements about the administration of justice (references to ‘the duty to the administration of justice’ only appear in object sections and preambles).¹⁰⁹³ The new draft Solicitors’ Rules make clear that solicitors owe a paramount duty to the administration of justice and that the duty is ‘to prevail to the extent of inconsistency with any other duty’.¹⁰⁹⁴ I endorse this change which brings the duty to the administration of justice to the fore. I see no reason why a similar amendment should not be made to the Barristers’ Rules in Australia.¹⁰⁹⁵

The rules of conduct in most Australian jurisdictions currently impose a specific obligation on practitioners to inform clients (and where the practitioner is a barrister, to inform the instructing solicitor and client) about ‘the reasonably available alternatives to fully contested adjudication’.¹⁰⁹⁶ This provision has not been retained in the new draft professional rules (for solicitors or barristers).¹⁰⁹⁷ The provision is not strictly necessary.

[I]t is difficult to see how a lawyer can fulfil his or her duty to inform and advise a client fully (so as to enable the client to make informed decisions about what is, and what is not, in the client’s best interests) without informing the client of all procedural options, in addition to litigation, in a contentious matter.¹⁰⁹⁸

¹⁰⁹³ See, eg, the Object section, Victoria and Queensland Solicitors’ Rules and the Preamble of the Barristers’ Rules rr 1 and 3, discussed above n 247.

¹⁰⁹⁴ Draft Solicitors’ Rules 2010 r 3.1.

¹⁰⁹⁵ The provisions in the draft Barristers’ Rules 2010 are less direct (with the duty to the administration of justice appearing only as a principle). The more direct and explicit approach adopted in the Solicitors’ Rules is to be preferred.

¹⁰⁹⁶ LCA Model Rules r 12.3; Barristers’ Rules r 17A.

¹⁰⁹⁷ New legislation dealing with pre-litigation requirements imposes an obligation on practitioners to advise clients about the requirements and to assist them to comply with the requirements: see, eg, *Civil Dispute Resolution Act 2011* (Cth) s 9. In order to fulfil this requirement, practitioners must advise clients about ADR options. However, this legislation only covers matters in federal courts in Australia.

¹⁰⁹⁸ Wolski, above n 15, 77.

Nonetheless, there is some benefit in retaining the provision as it brings ADR processes to the forefront of the lawyer's mind. This is not a matter about which lawyers ought to retain discretion. At all times, they and their clients should at least consider whether or not the matter is appropriate for ADR.

The definition section of the current rules (which has been reiterated in the draft new rules) needs attention. As was mentioned in part 2, I think that the reference to 'mediations' actually means 'mediators' (the other two possibilities mentioned in part 2 make even less sense), but this interpretation is problematic. If legal practitioners owe mediators the same duties as they owe to judges, then it would seem that technically they are prohibited from making statements of opinion and misrepresentations about 'immaterial' matters to mediators (matters such as values, a client's willingness to settle, bottom lines and so on.) In my opinion, this is a problematic situation for tactics of this kind are commonly used, and considered by many people to be indispensable to effective negotiation.

My recommendation is to delete the reference to 'mediations' from the definition of 'court'. There is a strong case for arguing that the rule requiring candour to the court is irrelevant in the context of mediation since a mediator, unlike a judge, does not make a decision based on law (theoretically, he or she makes no decisions at all on substantive matters).¹⁰⁹⁹ And mediation is not, in theory at least, a fact finding process. These considerations do not apply with respect to arbitration which, like litigation, is an adjudicative process. An arbitrator makes findings of fact and applies agreed standards (such as rules of law or custom) to arrive at a decision which is binding upon the parties to a dispute. The reference to 'arbitrations' in the definition sections of the professional conduct rules in Australia might therefore appropriately be retained.

If the reference to 'mediations' is deleted from the definition section, the effect would be that legal representatives would not be specifically prohibited from making false statements to mediators (whether such statements concern law, fact, opinion, or non-material matters).

¹⁰⁹⁹ Yarn agrees with this view, noting that a decision made by a tribunal on the basis of incomplete or inaccurate information might undermine the integrity of the litigation process whereas candour may be 'arguably irrelevant' in mediation because the mediator has no role in determining the outcome: Douglas H Yarn, 'Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application' (2001-2002) 54 *Arkansas Law Review* 207, 253-5.

This would not present a problem for:

1. Legal representatives are still bound by a general duty to be honest with those with whom they deal.
2. Legal representatives remain subject to the prohibition against misleading or deceiving an opponent with respect to material facts and law.

Legal representatives would also not be subject to a duty of candour vis à vis mediators (the silent safe harbour that exists between a legal representative and his or her opponent would be extended to cover communications between a legal representative and mediators). They would not be obliged to disclose relevant binding legal authorities and legislative provisions to mediators. The question of whether or not to reveal adverse facts to a mediator (and/or the opponent) would remain within the practitioner's discretion (subject to client instructions) as is currently the case.

If the reference to 'mediations' remains in the definition section of the rules, the rule drafters should clarify what exactly they mean by the reference. If they mean 'mediators', they should say so. If they amend the rules to read 'mediators', then legal practitioners are indeed required to inform mediators of any relevant binding authorities and legislative provisions of which they are aware. The rules should then stipulate whether or not the required disclosure can be made in a separate session with the mediator on a confidential basis (as opposed to needing to be made in a joint session with the other party).

I do not see a problem with rule 30.1 of the draft Solicitors' Rules 2010, if the rules are adopted in Australia. To some extent, it does erode the 'safe harbour' of silence discussed above but only in a narrow band of cases. The provision might be activated eg when a solicitor makes an obvious error calculating settlement figures in a transaction to sell a property and the other party seeks to take advantage of the error. This type of exception to the rules regulating candour does not interfere with the ability to negotiate effectively. Rather, it ensures that 'terms of settlement' (and likewise, 'consent orders') do in fact accurately record the parties' agreement and that the terms of settlement, as agreed, are implemented.

I do not think that the Australian rules need to be amended to include a provision similar to the ABA Model Rules r 1.2(a) which provides that, with some limitations, a lawyer shall abide by a client's decision concerning the objectives of the representation and consult with

the client as to the means by which the objectives are to be pursued. Courts in Australia have held that a practitioner is ‘not a mere agent and mouthpiece for his client, but a professional exercising independent judgment’¹¹⁰⁰ and have indicated that there is a need for serious consideration to be given ‘where the client’s instructions may run counter to normal ethical principles and a practitioner’s own personal standards’.¹¹⁰¹

I suggest that clause 6.2 of the *LCA Guidelines for Lawyers in Mediations* be reworded. It currently states:

The skills required for a successful mediation are different to those desirable in advocacy. It is not the other lawyer or mediator that needs to be convinced; it is the client on the other side of the table. A lawyer who adopts a persuasive rather than adversarial or aggressive approach, and acknowledges the concerns of the other side, is more likely to contribute to a better result.

I recommend that it be replaced with something along the following lines: ‘a mediation advocate may use a variety of styles and approaches to mediation. He or she will consider solutions that accommodate the interests of other parties as well as those of their client, and help clients to see that solutions, not judgments, may be in their best interests’.

7.5.2 Education and Training

If the behaviour of legal representatives (and clients) in mediation does indeed need changing, rather than increasing the standards of conduct, a better option is to educate the parties and their lawyers about the potential benefits of mediation.¹¹⁰²

Whereas professional conduct rules only target lawyers (and indirectly, their clients), education has the potential to reach everyone – even unrepresented parties. Appropriate education needs to take place in our homes, schools, law schools and in the community. Here, I address only the needs of law schools.

¹¹⁰⁰ *Legal Practitioners Complaints Committee and Fleming* [2006] WASAT 352 (7 December 2006) [70]-[71].

¹¹⁰¹ *Ibid.*

¹¹⁰² Boettger, above n 199, 39, 41; Lande, above n 189, 76, 115; Wolski, above n 72, 8 [2]; Bobette Wolski, ‘The Model Dispute Resolution Procedure for Australian Workplace Agreements: A Dispute Systems Design Perspective’ (1998) 10 *Bond Law Review* 7, 22.

It is now widely accepted that one of the primary goals of undergraduate legal education is ‘to introduce students to basic competencies required in legal practice’.¹¹⁰³ In an earlier article, I addressed the challenges involved in integrating requisite skills, values and attitudes into the law school curriculum.

If they do not do so already, law schools should attempt to impart skills and theory in the following areas:¹¹⁰⁴

1. Selection of cases suitable for ADR
2. Negotiation (both interest-based and positional)
3. Mediation and other dispute resolution processes
4. Assessment of the potential for success in mediation
5. Risk analysis and assessment
6. The giving of advice on prospects of success and the likely outcome of litigation.

Ideally, law schools should engage students in, and give them experience with, problem-solving, expanding the issues of a problem (rather than narrowing them), creativity,¹¹⁰⁵ addressing the needs and interests of clients and other parties, questioning and listening, practical judgment, co-operation, and coalition and team building.

Almost all studies and reports into legal education and the legal profession emphasise the need to teach skills in the context of ethics,¹¹⁰⁶ values and professional responsibility.¹¹⁰⁷ Obviously, I recommend that the ethics course should cover ethics and responsibility in mediation, as well as other contexts. It should not be limited to coverage of the formal rules of professional conduct as they apply in the context of litigation.

¹¹⁰³ See, eg, Mary E Keyes and Michael J Whincop, ‘The Moot Reconceived: Some Theory and Evidence on Legal Skills’ (1997) 8 *Legal Education Review* 1, 13; Wolski, above n 295, 222.

¹¹⁰⁴ Most skills cannot be clearly categorised in this manner, but rather overlap to a significant extent.

¹¹⁰⁵ As to whether (or not) creativity is teachable, see Carrie Menkel-Meadow, ‘Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?’ (2001) 6 *Harvard Negotiation Law Review* 97.

¹¹⁰⁶ For a definition of ‘legal ethics teaching’, see June Chapman, ‘Why Teach Legal Ethics to Undergraduates?’ (2002) 5 *Legal Ethics* 68. Also see Lawrence S Krieger, ‘The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness’ (2005) 11 *Clinical Law Review* 425, 436.

¹¹⁰⁷ See, eg, *MacCrate Report*, above n 641, 140-1; ALRC 89, above n 10, Recommendation 2, Ch 2; Fiona Cownie, ‘Alternative Values in Legal Education’ (2003) 6 *Legal Ethics* 159, 171; Stuckey et al, above n 57, 60-7; Wolski, above n 295, 222-5. In the UK, see the Lord Chancellor’s Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training* (1996) (commonly referred to as the ACLEC Report) [1.19], [2.4].

Law schools also have an obligation to impart to students a critical understanding of personal and professional values where relevant values include ‘the lawyer’s obligations to truth, honesty, and fair dealing; the responsibility to improve the integrity of the legal system’,¹¹⁰⁸ ‘the obligation to promote justice; and the obligation to provide competent representation’.¹¹⁰⁹

7.6 Directions for Future Research

A great deal more research is needed in this area. In closing I suggest some directions for future research.

According to NADRAC, there is ‘a strong view’ that the conduct of some legal practitioners in mediation ‘leaves much to be desired’.¹¹¹⁰ Undoubtedly some lawyers use mediation for strategic purposes eg to fish for information.¹¹¹¹ On the other hand, there is evidence that the presence of lawyers in mediation is helpful and that they do not interfere with the ability of parties to participate directly (albeit that this evidence is limited).¹¹¹² We need more qualitative and empirical evidence from which to draw firm conclusions about the behaviour of legal representatives in mediation. In particular, research should be aimed at discerning how and why lawyers behave as they do in mediation and at identifying the connections between mediator interventions and lawyer behaviour.

Research should focus on providing answers to some of the following questions about the behaviour of legal representatives:

- How often, and when, do they refer to the relevant rules of professional conduct?
- Do they approach mediation differently than they do unassisted negotiation, and if so, why?
- What do they understand by the terms ‘good faith’ and ‘cooperation’?
- Under what conditions do they reveal (or conceal) information?

¹¹⁰⁸ Stuckey et al, above n 57, 125.

¹¹⁰⁹ Ibid.

¹¹¹⁰ NADRAC, *The Resolve to Resolve Report*, above n 7, 171.

¹¹¹¹ Julie MacFarlane, ‘Culture Change – A Tale of Two Cities and Mandatory Court-Connected Mediation’ [2002] *Journal of Dispute Resolution* 241, 257 (this study concerned lawyers in Ottawa and Toronto).

¹¹¹² Howieson, above n 652, [83] (the author focused on pre-trial conferences conducted in the Local Court in Western Australia).

- Under what conditions do they act competitively as opposed to cooperatively?
- Do they respond differently when mediators are using different models of mediation?
If so how, and why?
- When do they seek an evaluative mediator and for what purposes?
- Do they act differently when the mediator is evaluative?
- Do they act differently in court/private mediations and if so, how and why?

We have entered an era of statutory and contractual attempts to increase the standards of conduct of participants in mediation. It is not clear that these attempts have been ‘successful’ in changing the conduct of participants. Further research is needed to determine:

- If the conduct of parties and their lawyers actually improves with requirements imposed by contract and legislation (and as a subsidiary issue, what are the appropriate benchmarks and criteria by which to judge ‘improvement’)
- What are the unintended consequences (both positive and negative) of these provisions (eg satellite litigation, inroads into confidentiality)
- If the benefits to be gained outweigh possible adverse consequences.

We should also try to identify differences, if any, between mandating such behaviour and allowing parties to agree to these standards through contract.

Collaborative law and cooperative law are relatively new processes in the dispute resolution arena. Further research in this area could focus on answering the following questions:

- What models predominate in Australia and what contractual variations have emerged?
- Do participants behave differently than they do in mediation and if so, why?
- Do participants engage more constructively in the negotiation process?
- Are participants satisfied with the process?
- Is there undue pressure on the parties (and how is it to be measured)? Where does the pressure originate from?

From the perspective of the parties, a world of research awaits. We need more evidence aimed at determining if lawyers negatively impact on the positive experience that mediation may have for parties and if so, how; and conversely, more evidence about the ways in which lawyers may improve the parties' experience of mediation.

Finally, we need to know more about the regulation of the behaviour of lawyers. Wilkins' concept of having a set of 'middle-level' principles awaits further research. Many lawyers (eg lawyer mediators) are currently governed by more than one set of rules of conduct. What can this tell us about the practicality of having multiple sets of rules?

Although the current professional conduct rules in Australia require clarification in some important respects as discussed above, the benchmarks set by the rules are appropriate for legal representatives in mediation. The rules safeguard important professional values and provide a framework from which legal representatives can arrive at ethical decisions in mediation. The resolutions suggested here are no more than suggestions. Ultimately each lawyer must weigh up a range of factors and arrive at a conclusion that he or she can justify. One of the great benefits of the existing rules is that they allow lawyers room to exercise discretion in their ethical decision-making. This should continue to be the case. If non-adversarial principles are desirable, as is argued by commentators such as Professors Menkel-Meadow and Kovach, then the choice and mode of application of such principles should be left to the discretion of individual legal representatives.

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